IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RIO GRANDE INTERNATIONAL STUDY CENTER (RGISC), *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States of America, *et al.*, Defendants.	Civil Action No. 1:19-cv-00720 (TNM)

DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants respectfully move to dismiss Plaintiffs' Complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted. The bases for this Motion are set forth in the accompanying Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss. A proposed order is also attached.

Dated: May 31, 2019

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN
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INTRODUCTION

On February 15, 2019, the President issued a proclamation declaring that a national emergency exists at the southern border. *See* Presidential Proclamation on Declaring a Nat'l Emergency Concerning the S. Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019) (Proclamation). Because the southern border is "a major entry point for criminals, gang members, and illicit narcotics" as well as "large-scale unlawful migration," the President determined that "[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency." *Id.* As the President has explained, tens of thousands of aliens are apprehended along the southern border each month and thousands of pounds of illegal drugs are smuggled across the border each year while, at the same time, migrants have begun organizing into caravans that include large numbers of families and unaccompanied children from Central American countries. *See* Veto Message for H.R. J. Res. 46, 2019 WL 1219481 (Mar. 15, 2019). The increasing surge of migrants, the highest in over a decade, has placed a tremendous strain on the limited resources of the Department of Homeland Security (DHS) and exacerbated the risks to border security, public safety, and the safety of the migrants themselves. *See* Letter from Secretary of Homeland Security Kirstjen M. Nielsen to the U.S. Senate and House of Representatives (Mar. 28, 2019), https://www.dhs.gov/sites/default/files/publications/19_0328_Border-Situation-Update.pdf (Nielsen Letter). Facilities are overcrowded, officers are stretched too thin, and resources are being redirected away from law enforcement to address this humanitarian and security crisis. *Id.*

The Government has been building barriers along the southern border since the 1990s pursuant to congressional authorization. To address the current national emergency at the southern border, three statutory authorities and sources of funding have been identified to continue the construction of additional barriers, in addition to the $1.375 billion recently appropriated by

Congress to DHS for such construction: (1) the Treasury Forfeiture Fund (31 U.S.C. § 9705); (2) the Department of Defense's (DoD) counter-drug support authority (10 U.S.C. § 284); and (3) the authority to reallocate funding from military construction projects, made available through the President's national emergency declaration (10 U.S.C. § 2808). Only the last source of statutory authority—§ 2808—depends on the President's national emergency declaration. The other two sources of authority—§ 9705 and § 284—are available regardless of the declared emergency.

The Proclamation follows a 40-year tradition of multiple Presidents of both parties declaring national emergencies to address a wide range of problems. Indeed, many of these declarations concerned situations that did not involve suddenly emerging threats or the sort of national crisis that currently exists on the southern border. Thus, for example, President Obama declared a national emergency to address "political repression" in Burundi, Exec. Order No. 13712, 80 Fed. Reg. 73633 (Nov. 23, 2015); President George W. Bush declared a national emergency to address the "fundamentally undemocratic March 2006 elections" in Belarus, Exec. Order No. 13405, 71 Fed. Reg. 35485 (June 16, 2006); and President Clinton declared a national emergency because "the Government of Burma has committed large-scale repression of the democratic opposition in Burma," Exec. Order No. 13047, 62 Fed. Reg. 28301 (May 22, 1997). And Presidents similarly have used this power to address longstanding problems, such as when George H.W. Bush declared a national emergency in 1990 to address the "proliferation of chemical and biological weapons" around the world. Exec. Order No. 12735, 55 Fed. Reg. 48587 (Nov. 16, 1990). President Trump's Proclamation concerning the national emergency at our Nation's southern border is neither unprecedented nor fundamentally different from past uses of the same authority. It is, in fact, more closely tied to exigent circumstances.

Plaintiffs seek to challenge the Proclamation and Defendants' reliance on all three statutory

authorities in addressing the border crisis, but the Court lacks jurisdiction to do so, and the Complaint fails to state claims upon which relief may be granted. As a threshold matter, judicial review of the Proclamation is not available under the National Emergencies Act (NEA), and in any event, such challenges raise political questions that courts are not equipped to answer, as courts overwhelmingly have recognized. Moreover, independent separation-of-powers concerns require dismissal of the President as a defendant because there is no cause of action against the President, and Plaintiffs may not obtain equitable relief directly against the President for his official conduct, particularly where, as here, relief could be provided by subordinate agency officials.

Plaintiffs also lack standing to challenge Defendants' use of § 9705, § 284, and § 2808 to construct barriers along the southern border. Dr. Ramirez and Carrizo/Comecrudo Nation of Texas (Carrizo/Comecrudo) lack Article III standing because Defendants are not constructing the specific border barrier projects they allege in the Complaint pursuant to the President's Proclamation, § 9705, § 284, or § 2808. Ms. Hull lacks standing because, contrary to her allegations, no barrier project at all is currently planned on or near her property. RGISC's claims are not ripe for review because no funding source has yet been identified for the border barrier projects it alleges. And the remaining organizational plaintiffs' grounds for standing fail because they rest on alleged mission-frustration and resource-diversion claims that are insufficient to satisfy Article III.

Assuming the Court has jurisdiction and Plaintiffs' claims are justiciable (which they are not), they fail on the merits. Their statutory claims are deficient for numerous reasons. Plaintiffs' Administrative Procedure Act (APA) claim fails at the threshold level because they have not alleged any final agency action with respect to DoD's use of § 2808. Moreover, any such use of § 2808 authority, assuming final action, and use of § 9705 authority are committed to agency discretion by law. Even looking beyond these threshold issues, Plaintiffs fail to state a claim under

the APA for violations of § 9705, § 284, § 2808, or the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 132 Stat. 2981 (2019) (CAA), because they do not identify agency action that is arbitrary or capricious, nor do they plausibly allege that any agency has exceeded its statutory authority. For the same reasons, Plaintiffs' alternative claims alleging a nonstatutory right to review ultra vires agency action do not meet the high standard required to bring such claims.

Finally, Plaintiffs' constitutional claims should be dismissed because they merely repackage claims of statutory violations in constitutional terms. Defendants are relying on express congressional authorization to fund border construction, not the President's independent Article II authority. Plaintiffs' effort to reframe alleged statutory violations as independent violations of the Appropriations Clause and separation of powers contravenes the principle that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims." *Dalton v. Specter*, 511 U.S. 462, 473 (1994).

For these reasons, as explained further below, the Complaint should be dismissed.

BACKGROUND

I. Congress's Express Authorization of Border Barrier Construction

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which authorizes the Secretary of Homeland Security to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." Pub. L. No. 104-208, Div. C., Title I § 102(a), 110 Stat. 3009 (1996), as amended (codified at 8 U.S.C. § 1103 note).

Since then, Congress has amended IIRIRA three times to expand the Government's authority to construct barriers along the southern border. In 2005, Congress grew frustrated by "[c]ontinued delays caused by litigation" preventing border barrier construction and thus granted

the Secretary of Homeland Security authority to waive any "laws that impede the expeditious construction of security infrastructure along the border." *See* H.R. Rep. 109-72, at 171 (May 3, 2005). The REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I § 102, 119 Stat. 231, 302, 306, empowers the Secretary of Homeland Security "to waive all legal requirements such Secretary, in such Secretary's sole discretion determines necessary to ensure expeditious construction of the barriers and roads under this section." Congress amended IIRIRA again as part of the Secure Fence Act of 2006, requiring construction of "physical barriers, roads, lighting, cameras, and sensors" across hundreds of miles of the southern border in five specified locations, including in southern Texas. Pub. L. No. 109-367, § 3, 120 Stat. 2638 (2006). In 2007, Congress expanded this requirement and directed "construct[ion of] reinforced fencing along not less than 700 miles of the southwest border." Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Title V § 564, 121 Stat. 1844 (2007) (IIRIRA § 102(b)).

Relying on these authorities, DHS has installed approximately 650 miles of barriers along the southern border.[1] *See* S. Appropriations Hr'g on the DHS FY 2018 Budget, 2017 WL 2311065 (May 25, 2017) (Testimony of then-Secretary of Homeland Security John Kelly). Courts have consistently denied relief in lawsuits challenging DHS's construction of border barriers under IIRIRA. *See, e.g.*, *N. Am. Butterfly Ass'n v. Nielsen*, 2019 WL 634596 (D.D.C. Feb. 14, 2019); *Save Our Heritage Org. v. Gonzalez*, 533 F. Supp. 2d 58 (D.D.C. 2008).

II. DHS's Recent Efforts to Expedite Border Barrier Construction

On January 25, 2017, the President issued an Executive Order directing federal agencies

[1] The Court may consider facts outside the Complaint on a motion to dismiss without converting the motion into a motion for summary judgment when the facts are subject to judicial notice. *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004). The Court may take judicial notice of the publicly available information on official government websites cited herein. *See Dinh Tran v. Dep't of Treasury*, 351 F. Supp. 3d 130, 133 n.5 (D.D.C. 2019); *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 67 (D.D.C. 2014).

"to deploy all lawful means to secure the Nation's southern border." Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017). In order to "prevent illegal immigration, drug and human trafficking, and acts of terrorism," *id.*, the Order required agencies to "take all appropriate steps to immediately plan, design and construct a physical wall along the southern border," including "[i]dentify and, to the extent permitted by law, allocate all sources of Federal funds" to that effort, *id.* at 8794. Accordingly, DHS has issued waivers pursuant to IIRIRA to expedite construction of border barrier projects over the past two years. *See, e.g.*, Determinations Pursuant to § 102 of the IIRIRA, as Amended, 83 Fed. Reg. 3012 (Jan. 22, 2018) (New Mexico); 83 Fed. Reg. 50949 (Oct. 10, 2018) (Texas).

III. Congress's Authorization for DoD Support of DHS's Border Security Efforts

Congress also has expressly authorized the U.S. military to provide a wide range of support to DHS at the southern border, including the "construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. § 284; *see id.* §§ 271–83. Since the early 1990s, military personnel have supported civilian law-enforcement agency activities to secure the border, counter the spread of illegal drugs, and respond to transnational threats. *See* H. Armed Servs. Comm. Hr'g on S. Border Defense Support (Jan. 29, 2019) (Joint Statement of John Rood, Under Secretary of Defense for Policy, and Vice Admiral Michael Gilday, Director of Operations for the Joint Chiefs of Staff), https://armedservices.house.gov/2019/1/department-of-defense-s-support-to-the-southern-border (Joint Statement of Rood and Gilday). Presidents George W. Bush and Barack Obama deployed military personnel to the southern border to support DHS's border security efforts. *Id.*

For decades, U.S. military forces have played an active role in barrier construction and reinforcement on the southern border. Military personnel were critical to construction of the first modern border barrier near San Diego, California, in the early 1990s as well as other border fence

projects. *See* H.R. Rep. No. 103-200, at 330–31 (1993) (commending DoD for its role in construction of the San Diego primary fence); Hr'g Before the S. Comm. on Armed Servs. Subcomm. on Emerging Threats and Capabilities, 1999 WL 258030 (Apr. 27, 1999) (Testimony of Barry R. McCaffrey, Dir. of the Office of Nat'l Drug Control Policy) (military personnel constructed over 65 miles of barrier fencing). In 2006, the National Guard improved the southern border security infrastructure by building more than 38 miles of fence, 96 miles of vehicle barrier, more than 19 miles of new all-weather road, and performing road repairs exceeding 700 miles. *See* Joint Statement of Rood and Gilday. More recently, the U.S. Army Corps of Engineers (USACE) has assisted DHS by providing planning, engineering, and barrier construction support. *See, e.g.*, *Gringo Pass, Inc. v. Kiewit Sw. Co.*, 2012 WL 12905166, at *1 (D. Ariz. Jan. 11, 2012).

IV. DoD's Current Support for DHS's Efforts to Secure the Southern Border

On April 4, 2018, the President issued a memorandum to the Secretary of Defense, Secretary of Homeland Security, and the Attorney General titled, "Securing the Southern Border of the United States." Presidential Memorandum, 2018 WL 1633761 (Apr. 4, 2018). The President stated "[t]he security of the United States is imperiled by a drastic surge of illegal activity on the southern border" and pointed to the "anticipated rapid rise in illegal crossings," as well as "[t]he combination of illegal drugs, dangerous gang activity, and extensive illegal immigration." *Id.* at *1. The President determined the situation at the border had "reached a point of crisis" that "once again calls for the National Guard to help secure our border and protect our homeland." *Id.* To address this crisis, the President directed the Secretary of Defense to support DHS in "securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband, gang members and other criminals, and illegal aliens into this country." *Id.* at *2. The President also directed the Secretary of Defense to request the use of National Guard personnel to assist in fulfilling this mission. *Id.*

In October 2018, the President expanded the military's support to DHS to include active duty military personnel. *See* Joint Statement of Rood and Gilday. Military personnel have been providing a wide range of border security support to DHS, including hardening U.S. ports of entry, erecting temporary barriers, and emplacing concertina wire. *See id.*

V. The President's Proclamation Declaring a National Emergency at the Southern Border

On February 15, 2019, the President issued a proclamation declaring that "a national emergency exists at the southern border of the United States." *See* Proclamation. The President determined that "[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency." *Id.* The President explained that "[t]he southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years." *Id.* "[B]ecause of the gravity of the current emergency situation," the President determined that "this emergency requires use of the Armed Forces" and "it is necessary for the Armed Forces to provide additional support to address the crisis." *Id.*

To achieve its purpose, the Proclamation makes available to the Acting Secretary of Defense the authority under 10 U.S.C. § 2808, which provides that, "without regard to any other provision of law," the Secretary of Defense "may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces." *See id.*; 10 U.S.C. § 2808(a).

On March 15, 2019, the President vetoed a joint resolution passed by Congress that would

have terminated the President's national emergency declaration. *See* Veto Message. The President relied upon statistics published by U.S. Customs and Border Protection (CBP) as well as recent congressional testimony by the Secretary of Homeland Security to reaffirm that a national emergency exists along the southern border. *See id.* at *1. The President highlighted (1) the recent increase in the number of apprehensions along the southern border, including 76,000 CBP apprehensions in February 2019; (2) CBP's seizure of more than 820,000 pounds of drugs in 2018; and (3) arrests in 2017 and 2018 of 266,000 aliens previously charged with or convicted of crimes. *See id.* The President also emphasized that migration trends along the southern border have changed from primarily single adults from Mexico, who could be easily removed upon apprehension, to caravans that include record numbers of families and unaccompanied children from Central America. *See id.* The President explained that this shift requires frontline border enforcement personnel to divert resources away from border security to humanitarian efforts and medical care. *See id.* Further, the President stated that criminal organizations are taking advantage of the large flows of families and unaccompanied minors to conduct a range of illegal activity. *See id.* With additional surges of migrants expected in the coming months, the President stated that border enforcement personnel and resources are strained "to the breaking point." *See id.* at *2. He concluded that the "situation on our border cannot be described as anything other than a national emergency, and our Armed Forces are needed to help confront it." *See id.*

The situation at the southern border has continued to deteriorate, to the point where DHS is facing "a system-wide meltdown." *See* Nielsen Letter. "DHS facilities are overflowing, agents and officers are stretched too thin, and the magnitude of arriving and detained aliens has increased the risk of life threatening incidents." *Id.*

VI. The Use of Spending Authorities for Barrier Construction

In the Department of Homeland Security Appropriations Act, 2019 (DHS Act)—a

component of the CAA—Congress appropriated $1.375 billion of the total amount made available under the "U.S. Customs and Border Protection—Procurement, Construction, and Improvements" appropriation for "the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector." Pub. L. No. 116-6, § 230(a), 133 Stat. 13 (2019). The Act provided that these funds "shall only be available for operationally effective designs." *Id.* § 230(b). It further required, prior to the use of these appropriated funds for barrier construction within the limits of five specified cities or census-designated places, that DHS consult with local elected officials. *Id.* § 232. Finally, the Act proscribed the use of "funds made available by this Act or prior Acts . . . for the construction of pedestrian fencing" in five specific areas in the Rio Grande Valley. *Id.* § 231. It did not otherwise restrict the use of appropriated funds for border barrier construction.

On the same day the President issued the Proclamation, the White House publicly released a fact sheet announcing the sources of funding to be used to construct additional barriers along the southern border. In addition to the $1.375 billion appropriation to DHS, the fact sheet identifies three additional sources of funding, which it explains will be used sequentially and as needed:

A. About $601 million from the Treasury Forfeiture Fund;

B. Up to $2.5 billion under the Department of Defense funds transferred for Support for Counterdrug Activities (10 U.S.C. § 284);

C. Up to $3.6 billion reallocated from Department of Defense military construction projects for military construction pursuant to 10 U.S.C. § 2808, made available by the President's declaration of a national emergency.

See President Donald J. Trump's Border Security Victory (Feb. 15, 2019), www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory; *see also* The Funds Available To Address The Nat'l Emergency At Our Border (Feb. 26, 2019), www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border.

STATUTORY FRAMEWORK

I. National Emergencies Act

The NEA, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-51), was an effort by Congress to "establish procedural guidelines for the handling of future emergencies with provision for regular Congressional review." S. Rep. No. 94-922, at 1 (1976).[2] Title II of the NEA—codified at 50 U.S.C. § 1621—prescribes rules for Presidential declarations of national emergencies. Section 1621(a) authorizes the President to "declare [a] national emergency" with respect to statutes "authorizing the exercise, during the period of a national emergency, of any special or extraordinary power." 50 U.S.C. § 1621(a). Section 1621(b) states that "[a]ny provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with [the NEA]." *Id.* § 1621(b).

Congress did not define the term "national emergency" or place any conditions on the President's ability to declare a national emergency. Instead, Congress intentionally left this determination to the President. As the co-chairmen of the Special Congressional Committee on National Emergencies that studied the issue and drafted the NEA explained, "[W]e did review this possibility of defining what national emergencies might be comprehended; and we decided you would cause more trouble by trying to define it than just saying 'national emergency' . . . We felt it would be wrong to try to circumscribe with words with what conditions a President might be

[2] The NEA was the culmination of a multi-year effort by Congress to examine the field of emergency statutes and procedures. *See* S. Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies and Delegated Emergency Powers, 94th Cong., 2d Sess., The National Emergencies Act Source Book: Legislative History, Texts, and Other Documents, at 3–9 (1976) (summarizing legislative history of NEA from 1972–1976, including extensive work conducted by the Senate Special Committee on National Emergencies) (NEA Source Book).

confronted." Nat'l Emergencies Act: Hr'gs Before the Subcomm. on Admin. Law and Governmental Relations, 94th Cong. 27 (March 6, 1975) (statement of Sen. Mathias); *see id.* at 31 ("[W]e didn't attempt to define it specifically because we were afraid we would circumscribe the President's constitutional powers."); *see id.* at 27 (statement of Sen. Church) ("[O]nce we got into that thicket [of defining a national emergency] it became evident that we would be creating more problems than we would be solving."). And during the final debate on the NEA, the House of Representatives specifically rejected an amendment that would have limited the circumstances in which the President could declare a national emergency to times of war or attacks upon the United States only. *See* NEA Source Book at 278–80; *see id.* at 280 (statement of Rep. Moorhead) ("[T]his amendment would completely take away from the President the flexibility of acting in times of crisis or an emergency" and "it is important that we give our President some flexibility from time to time."). At the time of its passage, Congress thus expressly recognized that the NEA "makes no attempt to define when a declaration of national emergency is proper." Statement of Sen. Mathias at 9 (quoting S. Rep. No. 94-1168 (1976)).

The NEA was "an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes." *See* S. Rep. No. 94-1168, at 3. Accordingly, the NEA provides that "[w]hen the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act." 50 U.S.C. § 1631. The NEA thus establishes procedural guidelines for the President to follow before he may invoke other statutory authorities.

In the more than 40 years since Congress enacted the NEA, Presidents have exercised broad discretion in determining what challenges amount to national emergencies, declaring nearly 60

national emergencies addressing a wide variety of national and international challenges. For example, prior national emergency declarations have authorized the invocation of statutory powers to restrict the trade in uncut diamonds used to fund Sierra Leone's civil war, Exec. Order No. 13194, 66 Fed. Reg. 7389 (Jan. 18, 2001); to address the spread of swine flu in the United States, Proc. No. 8443, 74 Fed. Reg. 55439 (Oct. 23, 2009); and to promote democracy or conflict resolution in countries around the world, *see, e.g.*, Exec. Order No. 13712, 80 Fed. Reg. 73633 (Nov. 22, 2015) (addressing "violence against civilians" and "political repression" in Burundi).

The NEA also authorizes the President to renew declared emergencies annually without limitation. *See* 50 U.S.C. § 1622(d). Thirty-one national emergencies remain in effect today, with many having been renewed by multiple Presidents over several decades. For example, President Clinton declared a national emergency in 1996 after Cuban military aircraft intercepted and destroyed two unarmed U.S.-registered civilian aircraft in international airspace north of Cuba. *See* Proc. No. 6867, 61 Fed. Reg. 8843 (Mar. 1, 1996). The emergency remains in effect today, having been renewed over the course of 23 years by Presidents Bush, Obama, and Trump, even though President Obama concluded in 2016 that "the descriptions of the national emergency set forth in Proclamations 6867 and 7757 no longer reflect the international relations of the United States related to Cuba." *See* Proc. No. 9398, 81 Fed. Reg. 9737 (Feb. 24, 2016). Indeed, the first national emergency declared under the NEA—President Carter's 1979 emergency declaration stemming from the Iran hostage crisis—has been in effect for 39 years and is now being continued because "relations with Iran have not yet normalized, and the process of implementing the agreements with Iran, dated January 19, 1981, is ongoing." *See* Cont. of Nat'l Emergency With Respect to Iran, 2016 WL 6518765 (Nov. 3, 2016) (letter from President Obama); *see also* 83 Fed. Reg. 56251 (Nov. 8, 2018) (renewal by President Trump).

Nothing in the NEA requires that a national emergency be a sudden or unforeseen event, as some emergencies build through an accretion of events and exist over a considerable period of time. In 1990, for example, President George H. W. Bush declared a national emergency arising from the "proliferation of chemical and biological weapons" around the world. Exec. Order No. 12735, *supra*. Four years later, President Clinton added nuclear weapons proliferation to that emergency declaration. Exec. Order No. 12938, 59 Fed. Reg. 58099 (Nov. 14, 1994). President Clinton also declared a national emergency arising from narcotics trafficking centered in Colombia, Exec. Order No. 12978, 60 Fed. Reg. 54579 (Oct. 21, 1995), and President Obama declared a national emergency arising from the activities of certain transnational criminal organizations, Exec. Order No. 13581, 76 Fed. Reg. 44757 (July 24, 2011). These declarations, like the President's Proclamation, addressed longstanding policy challenges confronting the United States, even though they were neither new nor unforeseen at the time they were declared to be a national emergency. Indeed, the President's Proclamation acknowledged that the situation at the southern border is a "long-standing" problem and builds on previous efforts of President Obama to use emergency powers to address the threats along the southern border by declaring a national emergency targeting a Mexican cartel known as Los Zetas. *See id.*

Recognizing that, by their very nature, declarations of national emergency require the need for flexibility in policy choices that are the province of the political branches of the federal government, Congress gave itself the exclusive authority to exercise oversight of a President's national emergency declaration. As a remedy to potential overreach, Congress has authority to terminate a national emergency by enacting into law "a joint resolution." 50 U.S.C. § 1622(a)(1).[3]

[3] The original draft of the NEA would have automatically terminated a national emergency after six months unless extended by an act of Congress. *See* NEA Source Book at 7. Congress eliminated this provision during debate and replaced it with the requirement that Congress pass a

Emphasizing the political judgment that Congress must make, the NEA expressly requires Congress to meet "[n]ot later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, . . . to consider a vote on a joint resolution to determine whether that emergency shall be terminated." *Id.* § 1622(b); *see also id.* § 1622(c) (establishing procedure for both Houses of Congress to vote on a joint resolution terminating a national emergency). Additionally, Congress has imposed extensive reporting requirements on the Executive Branch when the President declares a national emergency. *See id.* § 1641(a)–(b) (requiring the President and each executive agency to maintain a file and index of, and transmit to Congress, certain orders, rules, and regulations); § 1641(c) (requiring the President to periodically transmit to Congress "a report on the total expenditures incurred by the United States Government . . . which are directly attributable to the exercise of powers and authorities conferred by such declaration"). The NEA does not provide any role for the courts in reviewing a national emergency declaration, as it does not create a private right of action or contain a civil enforcement mechanism.

II. 31 U.S.C. § 9705

The Treasury Department's Treasury Forfeiture Fund (TFF) collects proceeds from "seizures and forfeitures made pursuant to any law (other than section 7301 or 7302 of the Internal Revenue Code of 1986) enforced or administered by the Department of the Treasury or the United States Coast Guard." 31 U.S.C. § 9705(a). The TFF's authorizing legislation, 31 U.S.C. § 9705,

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"concurrent resolution" to terminate a national emergency. *See id.*; *Beacon Prods. Corp. v. Reagan*, 814 F.2d 1, 4 (1st Cir. 1987) (Breyer, J.). In 1985, Congress amended this provision and replaced the "concurrent resolution" requirement with one that calls for termination of a national emergency by "joint resolution." Pub. L. No. 99-93, § 801, 99 Stat. 405, 448 (1985). This amendment was the result of the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919, 959 (1983), which invalidated a similar provision as unconstitutional. *See United States v. Amirnazmi*, 645 F.3d 564, 581 n.26 (3d Cir. 2011).

sets forth the purposes for which the fund's revenue may be used. *See* S. Rep. No. 102-398 (1992). As relevant here, § 9705(g)(4)(B) states that, after reserving certain statutorily required amounts, any surplus unobligated funds "shall be available to the Secretary, without fiscal year limitation, . . . for obligation or expenditure in connection with the law enforcement activities of any Federal agency or of a Department of the Treasury law enforcement organization." The Treasury Secretary must give the House and Senate Appropriations committees at least 15 days' notice if he intends to expend more than $500,000 under this authority. *See* 31 U.S.C. § 9705(g)(4)(C).

On December 26, 2018, DHS submitted a request to the Department of the Treasury (Treasury) to use TFF to enhance border security infrastructure and operations in support of CBP's law enforcement efforts. *See* Second Declaration of Loren Flossman (Second Flossman Decl.) ¶ 9 (Ex. 1). Treasury approved DHS's request and, on February 15, 2019, notified Congress of this action, as by § 9705(g)(4)(C). *Id.* TFF funds are being made available to CBP in two tranches. *Id.* ¶ 10. The first tranche of $242 million was made available to CBP for obligation on March 14, 2019, and the second tranche of $359 million is expected to be made available for obligation at a later date upon Treasury's receipt of additional anticipated forfeitures. *Id.* CBP will use TFF funds exclusively for projects in the Rio Grande Valley Sector of Texas. *Id.* ¶¶ 4-5, 11-12.

III. 10 U.S.C. § 284

10 U.S.C. § 284 authorizes DoD to provide "support for the counterdrug activities . . . of any other department or agency of the Federal Government," 10 U.S.C. § 284(a), including for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States," *id.* § 284(b)(7). This authority may be invoked at any time and does not require a declaration of national emergency.

Congress first provided DoD this authority in the National Defense Authorization Act for Fiscal Year 1991. Pub. L. No. 101-510, § 1004, 104 Stat. 1485 (1991). Congress regularly

renewed § 1004 and praised DoD's involvement in building barrier fences along the southern border. For example, in 1993, Congress "commend[ed]" DoD's efforts to reinforce the border fence along a 14-mile drug smuggling corridor in the San Diego-Tijuana border area, calling the project "precisely the kind of federal-local cooperative effort the Congress had in mind in enacting section 1004." H.R. Rep. No. 103-200, at 330–31. Executive Branch officials and Congress have also noted the importance of DoD's involvement in border security projects to prevent drug smuggling. *See* Hr'g Before the S. Comm. on Armed Servs. Subcomm. on Emerging Threats and Capabilities, 1999 WL 258030 (Apr. 27, 1999) (Testimony of Barry R. McCaffrey) (testifying about the "vital contributions" made by DoD to construct barrier fencing "to support the efforts of law enforcement agencies operating along the Southwest border"); *see, e.g.*, H.R. Rep. No. 110-652, 420 (2008) (recommending a $5 million increase to DoD's funding to continue construction of a southern border fence, which was described as an "invaluable counter-narcotics resource"). In light of the threat posed by illegal drug trafficking, Congress permanently codified § 1004 at 10 U.S.C. § 284 in December 2016, directing DoD "to ensure appropriate resources are allocated to efforts to combat this threat." H.R. Rep. No. 114-840, 1147 (2016).

In accordance with § 284, on February 25, 2019, DHS requested DoD's assistance in blocking 11 specific drug-smuggling corridors along certain portions of the southern border. *See* First Declaration of Kenneth Rapuano (First Rapuano Decl.) ¶ 3, Ex. A (Ex. 2). The request sought the replacement of existing vehicle barricades or dilapidated pedestrian fencing with new pedestrian fencing, the construction of new and improvement of existing patrol roads, and the installation of lighting. *Id*. On March 25, 2019, the Acting Secretary of Defense approved two projects in Arizona and one in New Mexico, *id.* ¶ 4; however, the USACE has since decided not to construct one of the two Arizona projects under § 284 authority, *see* Second Declaration of

Kenneth Rapuano ¶ 4 (Ex. 3). On May 9, 2019, the Acting Secretary authorized the funding of four additional projects: one project is located in California (El Centro Project 1) and three projects are located in Arizona. *Id.* ¶ 6; *see also* First Rapuano Decl., Ex. A (describing project locations).

IV. 10 U.S.C. § 2808

First enacted as part of the 1982 Military Construction Authorization Act, Pub. L. No. 97-99, § 903, 95 Stat. 1359 (1981), and later amended by the Military Construction Codification Act of 1982, Pub. L. No. 97-214, § 2, 96 Stat. 153 (codifying 10 U.S.C. §§ 2801–08), 10 U.S.C. § 2808(a) provides:

> In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

Congress recognized that "it is impossible to provide in advance for all conceivable emergency situations" and filled "a gap that now exists with respect to restructuring construction priorities in the event of a declaration of war or national emergency." H.R. Rep. No. 97-44, at 72 (1981).

The term "military construction" in § 2808 "includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road (as described in section 210 of title 23)." 10 U.S.C. § 2801(a). Congress defined the term "military installation" as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." *Id.* § 2801(c)(4); *see also id.* § 2801(a) (defining "military construction project").

Presidents have invoked the military construction authority under § 2808 on two prior

occasions. First, President George H.W. Bush authorized the use of § 2808 in 1990 following the Government of Iraq's invasion of Kuwait. *See* Exec. Order No. 12722, 55 Fed. Reg. 31803 (Aug. 2, 1990); Exec. Order No. 12734, 55 Fed. Reg. 48099 (Nov. 14, 1990). Second, President George W. Bush invoked § 2808 in response to the terrorist attacks against the United States on September 11, 2001. *See* Proc. No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001); Exec. Order No. 13235, 66 Fed. Reg. 58343 (Nov. 16, 2001). The national emergency declaration stemming from the terrorist attacks of September 11, 2001, remains in effect today, *see* 83 Fed. Reg. 46067 (Sept. 10, 2018), and DoD has used its § 2808 authority to build a wide variety of military construction projects, both domestically and abroad, over the past 17 years, *see* Cong. Research Serv., Military Construction Funding in the Event of a Nat'l Emergency at 1–3 & tbl. 1 (updated Jan. 11, 2019).

Here, the Acting Secretary has not yet decided to undertake or authorize any barrier construction projects under § 2808. *See* Third Declaration of Kenneth Rapuano (Third Rapuano Decl.) ¶¶ 14, 15 (Ex. 4). DoD is currently undertaking an internal review process to inform any future decisions by the Acting Secretary about the use of § 2808 to fund border barriers, but that process remains ongoing and the Acting Secretary has not made any decisions at this time. *See id.*

PLAINTIFFS' CLAIMS

Plaintiffs in this action include RGISC, a nonprofit group in Laredo, Texas, that works to protect the Rio Grande River; Dr. Ramiro R. Ramirez and Ms. Elsa Hull, landowners in southern Texas; Carrizo/Comecrudo, an association of indigenous people native to the Rio Grande delta; and three nonprofit advocacy groups focused on workers' rights, immigration policy, and environmental protection: the Labor Council for Latin American Advancement (LCLAA), California Wilderness Coalition (CalWild), and GreenLatinos. Compl. ¶¶ 9-15, ECF No. 1. They bring this suit against the President, the Acting Secretary of Defense, Acting Secretary of Homeland Security, and Secretary of the Treasury in their official capacities. *Id.* ¶¶ 16-19.

Plaintiffs allege violations of the CAA, the NEA, § 2808, § 284, and § 9705 pursuant to a claimed "right of action to enjoin and declare unlawful official action that are *ultra vires* and exceed the President's statutory authority." *Id.* ¶¶ 90-97 (Count One). Plaintiffs also bring constitutional claims pursuant to the Appropriations Clause, *id.* ¶¶ 99-103 (Count Two), and separation of powers, *id.* ¶¶ 105-10 (Count Three). Finally, they allege pursuant to the APA that the agency Defendants' use of § 2808, § 284, and § 9705 for border barrier construction is contrary to the Constitution and in excess of statutory authority, and is arbitrary and capricious. Compl. ¶¶ 112-18 (Count Four); 5 U.S.C. § 706(2)(A)-(C). They seek declaratory and injunctive relief.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) requires dismissal of any claim over which a court lacks subject-matter jurisdiction. The complaining party has the burden of establishing the predicates to federal jurisdiction, including standing. *See Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007). In the absence of standing, a court lacks subject matter jurisdiction. *See id.* Moreover, a "justiciable 'controversy' [does not] exist[] when parties seek adjudication of a political question." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) (en banc) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007)). Although in evaluating Rule 12(b)(1) motions, the court must accept well-pleaded factual allegations as true, "the district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

Federal Rule of Civil Procedure 12(b)(6) mandates dismissal for failure to state a claim upon which relief can be granted. To pass muster, a complaint must contain "sufficient factual matter" to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint that

"tenders 'naked assertion[s]' devoid of 'further factual enhancement'" warrants dismissal. *Id.* (quoting *Twombly*, 550 U.S. at 557). Although a court must accept as true well-pleaded factual allegations and construe them in the light most favorable to the plaintiff, it need not accept "legal conclusions" or "mere conclusory statements." *Id*. Neither is a court required to accept as true a complaint's factual allegations if they "contradict exhibits to the complaint or matters subject to judicial notice." *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004). In addition to the facts alleged, a court may consider "documents attached as exhibits or incorporated by reference in the complaint, or documents upon which the plaintiff's complaint necessarily relies." *Cause of Action Inst. v. Eggleston*, 224 F. Supp. 3d 63, 70 (D.D.C. 2016) (internal quotation marks omitted).

ARGUMENT

I. The Court Lacks Jurisdiction.

Plaintiffs' Complaint suffers from jurisdictional defects. *First*, Plaintiffs' challenge to the President's decision to issue the Proclamation is nonjusticiable, both because the NEA impliedly precludes judicial review and because the declaration of a national emergency raises a political question courts are not equipped to answer. Furthermore, the President must be dismissed as a party because there is no cause of action against the President and Plaintiffs cannot obtain injunctive or declaratory relief against the President. *Second*, Plaintiffs do not have standing to maintain this suit because, for varying reasons, their allegations fail to meet Article III requirements. Accordingly, the Court should dismiss Plaintiffs' claims under Rule 12(b)(1).

A. Plaintiffs' Challenge to the President's Declaration of a National Emergency Should Be Dismissed.

This Court lacks subject-matter jurisdiction over Plaintiffs' allegations concerning the NEA and the President's Proclamation. Plaintiffs' challenge to the President's decision to issue the Proclamation is nonjusticiable, both because the NEA impliedly precludes judicial review and

because the declaration of a national emergency raises a political question courts are not equipped to answer. Congress has placed no limitations on the President's authority to declare a national emergency. Because the NEA does not define the term "national emergency," the text and structure of the statute evidence Congress's choice to leave this determination to the President, subject only to congressional oversight as provided by the NEA. But whether viewed as a statutory or separation-of-powers matter, the President is entitled to make a determination about what circumstances constitute a national emergency without judicial second guessing. Furthermore, the President must be dismissed as a party because there is no cause of action against the President, and Plaintiffs cannot obtain injunctive or declaratory relief against the President.

1. The NEA Evidences Congress's Intent to Preclude Judicial Review.

The Supreme Court has instructed that in determining whether a statute "precludes judicial review," a court must examine the "express language" of the statute as well as "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). That Congress intended to preclude judicial review need only be "fairly discernible" from the evidence. *Id.* at 351.

Here, Congress's intent to preclude judicial review is evidenced by the text of NEA, which does not define the term national emergency or provide courts with any standards by which to evaluate the President's exercise of this authority. *See* 50 U.S.C. § 1621. The lack of a definition in the statute reflects Congress's intentional decision to leave to the President the determination about when and under what circumstances to declare a national emergency. The absence of any judicially enforceable remedy is further supported by the fact that the NEA establishes procedural and reporting guidelines only that the President must follow when invoking other statutory authorities conditioned on a national emergency declaration. *See* 50 U.S.C. §§ 1631, 1641. Accordingly, the NEA does not provide a mechanism for litigants to have any role in the statutory

process, let alone a role that Plaintiffs could enforce in court. *See United States v. Amirnazmi*, 645 F.3d 564, 581 (3d Cir. 2011) (the "NEA places the onus on Congress to ensure emergency situations remain anomalous").

The lack of a judicial enforcement mechanism to challenge a national emergency declaration is reinforced by the NEA's exclusive remedial scheme for Congress to challenge through political means the President's determination that a particular national emergency exists. *See* 50 U.S.C. § 1622; *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."). As explained above, Congress has the authority to terminate a national emergency by enacting into law "a joint resolution." 50 U.S.C. § 1622(a)(1). Further, the NEA expressly requires Congress to vote on whether to terminate the declared emergency within six months of the President's declaration and establishes expedited procedures for Congress to vote on such a measure once a termination resolution is introduced. *Id.* § 1622(b), (c). Here, majorities of both Houses of Congress attempted to terminate the President's national emergency declaration by passing a joint resolution, but the President vetoed that measure, and there was insufficient support for termination among members of Congress to override the President's veto to enact the joint resolution into law. *See* Summary, H.R. J. Res. 46, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-joint-resolution/46. The fact that there was insufficient congressional will to exercise its ability to terminate the Proclamation through the NEA's statutory procedures only underscores that this dispute should not be adjudicated by the Court. *Cf. Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015) ("Having failed to prevail in their own Houses, the suitors could not repair to the Judiciary to complain.").

Moreover, when Congress had the opportunity to change the oversight structure of the NEA in response to the Supreme Court's *Chadha* decision that declared the "legislative veto" unconstitutional, Congress notably changed the termination threshold from a "concurrent resolution," which does not involve Presidential approval, to a "joint resolution," which requires either Presidential approval or adequate congressional support to override a Presidential veto in order to be enacted.[4] *See supra* 14-15. Congress could have instituted a different mechanism, such as creating a judicial-enforcement regime, but Congress did not adopt other alternatives. *See Beacon Prods. Corp. v. Reagan*, 814 F.2d 1, 4 (1st Cir. 1987) (Breyer, J.) ("This legislative history makes clear that Congress intended to impose upon itself the burden of acting affirmatively to end an emergency."). Instead, Congress gave itself the power to oversee the President's use of statutory emergency authority, and there is no basis on which to create a new judicial remedy on top of Congress's carefully crafted framework. Where, as here, the statute expressly provides Congress with authority to terminate a national emergency, it is "an 'elemental canon' of statutory construction that . . . courts must be especially reluctant to provide additional remedies." *Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 533 (1989) (citations omitted).

Further, the NEA was the product of a multi-year study by Congress to address the field of national emergency authorities, and nothing in that extensive legislative history suggests that Congress intended to allow judicial challenges to the President's national emergency declarations. To the contrary, the legislative history shows that Congress, not the courts, would be the branch of government to oversee the President's use of his emergency powers. *See* NEA Source Book at

[4] The NEA's "provision for termination by concurrent resolution is unconstitutional because, unlike a joint resolution, this type of termination would enable Congress to take legislative action without presenting the action to the President for his signature." *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1196 (D. Mass. 1986), *aff'd,* 814 F.2d 1 (1st Cir. 1987); *see supra* n.3.

338 ("every type and class of presidentially declared emergency will be subjected to congressional control" and "the legislative branch will be in a position to assert its ultimate authority"); *see also Block*, 467 U.S. at 349 (preclusion of judicial review may be implied from "specific legislative history" alone). Moreover, given the President's "unique position in the constitutional scheme," *Nixon v. Fitzgerald*, 457 U.S. 731, 749–50 (1982), any remedial scheme where litigants could sue the President to challenge a national emergency declaration would raise separation-of-powers concerns and create tension with the Supreme Court's admonition that federal courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson,* 71 U.S. (4 Wall.) 475, 501 (1866). There is no indication in the legislative history that Congress gave consideration to those weighty issues or concluded that such lawsuits against the President should proceed. *See* NEA Source Book at 342 (stating that "there is [no] intent here to limit either the President's power or flexibility to declare a national emergency" and there is no intent to limit "the subject matter of the emergency or the timing of its declaration") (statements of Reps. Moorhead and Flowers). In the absence of clear congressional direction, the Court should not imply a remedy that would conflict with longstanding separation-of-powers principles. *Cf. Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) (inferring a cause of action is a "significant step under separation-of-powers principles" because it intrudes on the prerogatives of Congress).

In light of the NEA's text, structure, and legislative history, Congress has precluded judicial review of the President's national emergency Proclamation.

2. Plaintiffs' Challenge to the President's National Emergency Declaration Presents a Nonjusticiable Political Question.

Courts that have considered the issue have uniformly concluded that a Presidential declaration of a national emergency is a nonjusticiable political question. *See, e.g.*, *Amirnazmi*, 645 F.3d at 581 ("[F]ederal courts have historically declined to review the essentially political

questions surrounding the declaration or continuance of a national emergency." (citation omitted)); *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1081 (9th Cir. 1982) ("[W]e will not address these essentially-political questions . . . .").[5] Since passage of the NEA in 1976, there have been nearly 60 national emergencies declared by seven different Presidents, and even in the few instances where the declarations have been challenged, *see supra* n.5, no court has ever reviewed the merits.[6] Plaintiffs' request for this Court to take that unprecedented step is without

[5] *See also Soudavar v. Bush*, 46 F. App'x 731 (5th Cir. 2002) (per curiam) (affirming district court decision dismissing a challenge to executive orders imposing national emergency sanctions on Iran as involving a "nonjusticiable political question"); *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 579 (C.C.P.A. 1975) (courts will not "review the judgment of a President that a national emergency exists"); *Chichakli v. Szubin*, 2007 WL 9711515, at *4 (N.D. Tex. June 4, 2007) (holding that a challenge to President Bush's declaration of a national emergency with respect to the "unstable situation" in Liberia "presents a nonjusticiable political question"), *aff'd in part, vacated in part*, 546 F.3d 315 (5th Cir. 2008); *Beacon Prods. Corp.*, 633 F. Supp. at 1194–45 (whether national emergency existed with respect to Nicaragua presents a nonjusticiable political question); *Sardino v. Fed. Reserve Bank of N.Y.*, 361 F.2d 106, 109 (2d Cir. 1966) (concluding that President Truman's national emergency declaration concerning the situation in Korea is not justiciable and "courts will not review a determination so peculiarly within the province of the chief executive"); *Veterans & Reservists for Peace in Vietnam v. Reg'l Comm'r of Customs, Region II*, 459 F.2d 676, 679 (3d Cir. 1972) ("[A] President's declaration of national emergency is unreviewable."); *Santiago v. Rumsfeld*, 2004 WL 3008724, at *3 (D. Or. Dec. 29, 2004) (holding that plaintiffs challenge to "whether the national emergency declared by the President continues to apply to Afghanistan" has "raised an essentially political issue" and "[c]ourts should refrain from ruling on such issues"), *aff'd*, 403 F.3d 702 (9th Cir. 2005) *and aff'd* 407 F.3d 1018 (9th Cir. 2005); *United States v. Groos*, 616 F. Supp. 2d 777, 788–89 (N.D. Ill. 2008) ("The court cannot question the President's political decision" to declare a national emergency regarding "unrestricted access of foreign parties to U.S. goods and technology"); *Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) ("[T]o the extent that the plaintiffs' inquiry into the 'true facts' of the Libyan crisis would seek to examine the President's motives and justifications for declaring a national emergency, such an inquiry would likely present a nonjusticiable political question.").

[6] Past practice also belies Plaintiffs' suggestion that this national emergency declaration is both justiciable and invalid because the President stated that he "[didn't] need" to issue the declaration and "could do the wall over a longer period of time." *See* Compl. ¶ 59. A national emergency declaration necessarily reflects an exercise of discretion, and Presidents have often chosen to declare national emergencies to address circumstances that were neither new nor unforeseen at the time the declaration issued. *See supra* 13. No court has ever conducted the type of judicial second guessing that Plaintiffs propose here by evaluating whether an emergency could have been addressed without relying on emergency statutory authorities.

merit, and this Court should not depart from this long line of unbroken authority.

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Both the separation-of-powers doctrine and the policy of judicial self-restraint require that federal courts refrain from intrusion into areas committed by the Constitution to the Legislative and Executive Branches of the Government. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). The *Baker* Court set forth the factors that a court is to consider in determining whether a particular claim raises nonjusticiable political questions:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. The existence of any one of these factors indicates the existence of a political question. *Id.* Here, Plaintiffs' assertion that the situation along the southern border does not constitute a national emergency runs afoul of most, if not all, of these factors.

First, there are no judicially manageable standards to ascertain whether or when to declare a national emergency. As explained above, Congress intentionally chose not to define the term "national emergency" and left that determination to the President, subject only to oversight from Congress. *See supra* 11-12. The NEA sets forth no criteria from which the Court could judge the President's action or make a determination about whether a particular issue constitutes a national emergency. *See Spawr Optical Research*, 685 F.2d at 1080 ("The statute contained no standards

by which to determine whether a national emergency existed or continued."). Plaintiffs ask the Court to take the remarkable step of supplanting the President's determination with the "courts' own unmoored determination of what United States policy toward [the southern border] should be." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). The Court could not decide this question "without first fashioning out of whole cloth some standard for when" a national emergency "is justified." *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 845. To grant Plaintiffs' requested relief, the Court would have to make, with no judicially manageable standards to guide it, numerous political judgments about how the current humanitarian and security crisis at the border impacts immigration policy, foreign relations, public safety, and national security. "The judiciary lacks the capacity for such a task." *Id.*

Second, any such determinations would require precisely the sort of "policy determination of a kind clearly for nonjudicial discretion" that the Supreme Court has indicated is a hallmark of a political question. *Baker*, 369 U.S. at 217. As the Court has long recognized, illegal immigration creates "significant economic and social problems" in the United States. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *see also Plyler v. Doe*, 457 U.S. 202, 237 (1982) (Powell, J., concurring) (recognizing illegal immigration as "a problem of serious national proportions"). More recently, in *Arizona v. United States*, 567 U.S. 387 (2012), the Court emphasized that the problems posed by illegal immigration "must not be underestimated" and it credited evidence of problems "associated with the influx of illegal migration across private land near the Mexican border," including "an epidemic of crime" and "safety risks." *Id.* at 397–98 (citation omitted).

The President has chosen to confront these and other challenges traceable to the current crisis at the border by declaring a national emergency and invoking the express powers delegated to him by Congress. *See* Proclamation. Under these circumstances, the Court cannot review the

matter without second-guessing the President's policy determinations. Decisions "about how best to enforce the nation's immigration laws in order to minimize the number of illegal aliens crossing our borders patently involve policy judgments about resource allocation and enforcement methods." *New Jersey v. United States*, 91 F.3d 463, 470 (3d Cir. 1996). These "issues fall squarely within a substantive area clearly committed by the Constitution to the political branches; they are by their nature peculiarly appropriate to resolution by the political branches of government both because there are no judicially discoverable and manageable standards for resolving them." *Id.* (citation omitted); *see Sadowski v. Bush*, 293 F. Supp. 2d 15, 19 (D.D.C. 2003) ("[D]eciding how to best enforce existing immigration laws and policies and how to keep out illegal immigrants requires making policy judgments that are suited for nonjudicial discretion . . . ."). Accordingly, the President's Proclamation is not reviewable in this case.

Third, the type of policy decisions that Plaintiffs ask this Court to make are entrusted to the political branches, not the courts. "[T]he power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). As the Supreme Court explained:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.

Mathews v. Diaz, 426 U.S. 67, 81 (1976) (footnote omitted); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from

judicial control."). Moreover, "[t]he political branches are far better equipped (and more accountable to the people) for making the types of decisions that arise in the military setting," and "[j]udges have long respected this allocation of powers." *Doe 2 v. Shanahan*, 917 F.3d 694, 719 (D.C. Cir. 2019) (Williams, J., concurring). The President's decision to declare a national emergency is a quintessential policy decision in an area reserved to the political branches involving matters of immigration, foreign relations, use of military forces, and national security. *See, e.g.*, *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) ("[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States."); *Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 129 (D.D.C. 2007) (construction of border barriers "pertains to both foreign affairs and immigration control—areas over which the Executive Branch traditionally exercises independent constitutional authority"). The Court should not substitute its judgment for that of the President on these sensitive policy issues that are nonjusticiable political questions.

3. The President Should Be Dismissed as a Party to this Lawsuit Because There is No Cause of Action Against the President and Plaintiffs Cannot Obtain Equitable Relief Against the President.

Plaintiffs' claims against the President suffer from separate and independent problems: there is no cause of action against the President, and Plaintiffs may not obtain—and the Court may not order—equitable relief directly against the President for his official conduct.

Plaintiffs lack a cause of action to sue the President. The actions of the President are not reviewable under the APA, *see Dalton*, 511 U.S. at 479, and likewise there is no implied equitable cause of action to do so. Although courts of equity may in some circumstances permit suits to "enjoin unconstitutional actions by . . . federal officers," *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015), the availability of such relief depends on whether it "was traditionally accorded by courts of equity," *Grupo Mexicano De Desarrollo S.A. v. All. Bond Fund*,

527 U.S. 308, 319 (1999). Here, there is no tradition of equitable relief against the President. To the contrary, the Supreme Court recognized over 150 years ago in *Mississippi v. Johnson* that federal courts lack jurisdiction to "enjoin the President in the performance of his official duties," 71 U.S. at 501, a principle the Court reaffirmed more recently in *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *id.* at 827 (Scalia, J., concurring in part and concurring in the judgment) ("apparently unbroken historical tradition supports the view" that courts may not order the President to "perform particular executive . . . acts").

Moreover, the Supreme Court has twice held that causes of action that are available against other government officials should not be extended to the President absent a clear statement by Congress. *See Nixon*, 457 U.S. at 748 n.27 (declining to assume that *Bivens* and other implied statutory damages "cause[s] of action run[] against the President of the United States"); *Franklin*, 505 U.S. at 800-01 (declining to find cause of action against the President under the APA "[o]ut of respect for the separation of powers and the unique constitutional position of the President"). Accordingly, in the absence of an express statutory cause of action against the President or a tradition of recognizing such suits as a matter of equity, there is no basis for the Court to infer equitable relief against the President. "The reasons why courts should be hesitant to grant such relief are painfully obvious" given the President's unique constitutional role and the potential tension with the separation of powers. *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996). Further, the Supreme Court has taken a "traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress." *Grupo Mexicano*, 527 U.S. at 329. Any expansion of an equitable remedy against the President here would create separation-of-powers problems by usurping "the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *See Abbasi*, 137 S. Ct. at 1858.

Lower courts have followed the logic of *Franklin* and *Massachusetts* by dismissing the President as a defendant and declining to impose either declaratory or injunctive relief against him in his official capacity. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) ("In light of the Supreme Court's clear warning that such relief should be ordered only in the rarest of circumstances we find that the district court erred in issuing an injunction against the President himself."), *vacated and remanded*, 138 S. Ct. 353 (2017); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) ("[T]he extraordinary remedy of enjoining the President is not appropriate here . . . ."), *vacated as moot and remanded*, 138 S. Ct. 377 (2017); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief."); *Doe 2 v. Trump*, 319 F. Supp. 3d 539, 541 (D.D.C. 2018) (dismissing "the President as a party to this case").

In any event, Plaintiffs could potentially obtain the relief they seek against the agency Defendants because the gravamen of Plaintiffs' Complaint is that the agencies, not the President, will construct or fund border barriers in excess of their statutory authorities or in violation of the Constitution. Accordingly, in addition to the reasons explained above, the President should be dismissed in order to avoid an unnecessary separation-of-powers conflict. *See Swan*, 100 F.3d at 978 ("In most cases, any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials.").[7]

[7] Although district courts in some recent cases have declined to dismiss the President at the motion-to-dismiss stage on the ground that doing so would be premature in light of uncertainty about the relief that could be provided by the defendant-agencies, that is not the situation here. *See Centro Presente v. DHS*, 332 F. Supp. 3d 393, 418 (D. Mass. 2018); *CASA de Maryland, Inc. v. Trump*, 355 F. Supp. 3d 307 (D. Md. 2018); *Saget v. Trump*, 345 F. Supp. 3d 287, 297 (E.D.N.Y. 2018). There is no question in this case that relief against the agencies would be sufficient to redress Plaintiffs' claims seeking to halt border barrier construction. *See Swan*, 100 F.3d at 978.

B. Plaintiffs Have Not Alleged Article III Standing.

Plaintiffs also fail to plead allegations sufficient to satisfy Article III's standing requirement. To demonstrate standing, Plaintiffs must satisfy a three-pronged test. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) (citing *Defs. of Wildlife*, 504 U.S. at 560). First, Plaintiffs must have suffered an injury-in-fact, defined as a harm that is "concrete and actual or imminent, not conjectural or hypothetical." *Byrd v. EPA*, 174 F.3d 239, 243 (D.C. Cir. 1999) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). Second, the injury claimed must be fairly traceable to the governmental conduct alleged. *Sierra Club*, 292 F.3d at 898. No standing exists where the court "would have to accept a number of very speculative inferences and assumptions in any endeavor to connect [the] alleged injury with [the challenged conduct]." *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980). Finally, it must be likely that the requested relief will redress the alleged injury. *Sierra Club*, 292 F.3d at 898.

1. Plaintiffs Ramirez and Carrizo/Comecrudo Do Not Satisfy the Traceability and Redressability Prongs of Article III's Standing Requirement.

Dr. Ramirez and Carrizo/Comecrudo have not sufficiently pleaded a concrete and actual injury-in-fact that satisfies the traceability and redressability prongs of Article III's standing requirement. "The 'traceability' and 'redressability' requirements are closely related." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 801 (D.C. Cir. 1987) (Bork, J.) (citing *Von Aulock v. Smith*, 720 F.2d 176, 180 (D.C. Cir. 1983)). In such cases, both prongs can be said to focus on principles of causation: traceability turns on the causal nexus between the challenged agency action and the asserted injury, while redressability centers on the causal connection between the asserted injury and the requested judicial relief. *See Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984), *overruled on other grounds in Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

a. Plaintiffs do not satisfy the traceability prong.

Dr. Ramirez and Carrizo/Comecrudo fail to demonstrate how they suffer any injury that is traceable to the President's Proclamation or any actions of the agency Defendants undertaken pursuant to § 9705, § 284, or § 2808. Indeed, their allegations that such actions have caused their alleged injury are not only purely speculative,[8] they are simply incorrect. As explained by Loren Flossman, the Acquisition Program Manager for CBP's Wall Program Management Office, the barrier project planned near the Jackson Ranch Church and Cemetery and Eli Jackson Cemetery in Hidalgo County, Texas, as relevant to Dr. Ramirez's and Carrizo/Comecrudo's allegations, "will be funded using CBP's Fiscal Year 2019 appropriated funds (Public Law 116-6, § 230)." Declaration of Loren Flossman (Flossman Decl.) ¶ 8 (Ex. 5). "It will not be constructed, as Plaintiffs allege, with funds transferred pursuant to the President's national emergency proclamation, including 10 U.S.C. § 2808, or pursuant to 10 U.S.C. § 284 or 31 U.S.C. § 9705." *Id.* Indeed, Mr. Flossman has explained that CBP will not use funds transferred pursuant to three authorities challenged in this suit—the Proclamation, § 284, or § 2808—"for any ongoing or planned barrier construction" in the entire Rio Grande Valley (RGV) Sector, which includes Hidalgo County. Second Flossman Decl. ¶ 8 ("[a]ll barrier construction projects currently ongoing or planned in the RGV are or will be funded" from only CBP's fiscal year 2018 and 2019

[8] Plaintiffs do not specifically allege facts establishing that construction of the border barrier projects alleged in the Complaint will actually be funded by the challenged legal authorities. At most, the Complaint cites a list of "highest priority border wall miles" that DHS identified in late 2018 for potential use of *fiscal year 2019 appropriations*, subject to the amount of those appropriations. *See* Compl. ¶ 77 & n.28 (citing "Walls Work," DHS, Dec. 12, 2018, https://www.dhs.gov/news/2018/12/12/walls-work). Beyond that single reference, Plaintiffs only surmise that the barrier projects will be funded instead by § 9705, § 284, or § 2808. The Court need not accept Plaintiffs' "speculative inferences and assumptions" in determining whether they have "connect[ed] [the] alleged injury with [the challenged conduct]." *Winpisinger*, 628 F.2d at 139; *see Iqbal*, 556 U.S. at 678. The face of the Complaint shows they have not.

appropriations or from "funds received from the Treasury Forfeiture Fund").

Thus, evidentiary material in the record establishes that this specific project is not funded pursuant to any of the authorities challenged in this case. *See* Flossman Decl. ¶ 8; *see* Second Flossman Decl. ¶ 8. Because Plaintiffs have not alleged that Defendants are acting pursuant to the statutory authorities they dispute, they cannot establish the traceability prong of Article III's standing requirement. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013) (holding the plaintiffs failed to establish traceability where they could not show the government acted under the specific statutory authority being challenged); Wright, Miller & Cooper, Fed. Practice & Procedure, § 3531.4 (2d ed. 1984) ("The very notion of injury implies a causal connection to the challenged activity; an injury caused by other events is irrelevant" to standing).

b. Plaintiffs do not satisfy the redressability prong.

Dr. Ramirez and Carrizo/Comecrudo also have not established that the judgment they seek would redress the injuries they have identified. "Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996). In this action, Plaintiffs seek a declaratory judgment that the President's Proclamation is unconstitutional. *See* Compl., Prayer for Relief ¶ (A). They also seek injunctive relief to prevent the agency Defendants from using funds under § 9705, § 284, or § 2808 to build the alleged border barrier projects. *Id.* ¶ (C). To demonstrate redressability, Plaintiffs would have to allege (and ultimately prove) that it is "likely," as opposed to merely "speculative," *Friends of the Earth, Inc. v. Laidlaw Env't Srvs., Inc.*, 528 U.S. 167, 181 (2000), that the requested judgment would redress their injuries. Plaintiffs cannot.

Here, Dr. Ramirez and Carrizo/Comecrudo identify alleged harms resulting from a planned

project near the Jackson Ranch Church and Cemetery and Eli Jackson Cemetery in Hidalgo County. *See* Compl. ¶¶ 83-84; *see also Freedom Republicans, Inc. v. Fed. Election Comm'n,* 13 F.3d 412, 416 (D.C. Cir. 1994) (redressability requires that the court first "identify the components of [Plaintiffs'] alleged harm"). Plaintiffs have not demonstrated that it is "likely" an order declaring the President's Proclamation unlawful, and enjoining the agency Defendants from using § 9705, § 284, or § 2808 to fund border barrier construction, will result in the removal of the harm they have identified. *Steel Co*., 523 U.S. at 107 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). Even if this Court were to enter such relief, it would have no effect on CBP moving forward with this planned project because the project is not being funded from the sources of authority that are disputed in the Complaint. *See supra* 34. Accordingly, the judgment sought by Dr. Ramirez and Carrizo/Comecrudo would not likely redress their alleged injuries.

2. Plaintiff Hull Has Not Sustained the Alleged Injury-in-Fact.

Ms. Hull's standing claim fails for the simple reason that she has not suffered any alleged injury-in-fact. Ms. Hull claims that, in February 2019, she learned that CBP planned to "build permanent, impermeable barriers on 150 river miles in Webb and Zapata Counties" in Texas. Compl. ¶ 12.c. She further alleges that she lives on property located within 200 yards of the Rio Grande River in Zapata County, *id.* ¶ 12.c, and speculates without any factual support that any border barrier construction planned in her county will occur on her three-acre lot. *See Iqbal*, 556 U.S. at 678 ("'naked assertion[s]' devoid of 'further factual enhancement'" are insufficient) (quoting *Twombly*, 550 U.S. at 557). To the contrary, as Mr. Flossman confirms, CBP currently has no ongoing or planned projects at all in Zapata County, Texas, including for the home address given by Ms. Hull. Flossman Decl. ¶ 10. Accordingly, Ms. Hull has not pleaded, and in fact has

not sustained, an actual injury-in-fact as required by Article III. *See Byrd*, 174 F.3d at 243.

3. Plaintiff RGISC's Claims Are Not Ripe.

RGISC's challenges are not ripe because CBP has not yet identified a funding source for the border barrier projects currently planned in the Laredo Sector. "The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003). It "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Id.* at 807. It also "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 807–08; *see Chlorine Inst., Inc. v. Fed. R.R. Admin.*, 718 F.3d 922, 928 (D.C. Cir. 2013).

A case ripe for judicial review cannot be "nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952). Courts evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds in Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin.*, 769 F.3d 1173, 1182 (D.C. Cir. 2014).

As explained in the Flossman Declaration, "[b]uilding a border barrier in the Laredo Sector is a top priority requirement for CBP." Flossman Decl. ¶ 5. At this time, however, "CBP has not determined the funding source that will be associated with Laredo Sector barrier construction." *Id*. Because there has been no decision on the funding source, RGISC's claims alleging that

Defendants have exceeded their statutory and constitutional authority vis-à-vis border barrier projects in Laredo are not fit for judicial review at this time. "The 'fitness' factor takes into account whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Nat'l Oilseed Processors Ass'n*, 769 F.3d at 1182. Here, no final agency decision about how to fund Laredo Sector projects has been made. *Cf. Abbott Labs*, 387 U.S. at 149–52 (case was ripe where the challenged regulations were definitive and no further administrative proceedings were contemplated).

Mr. Flossman explains that, "[a]lthough a funding source has not been identified, funding for this planned project will not come from any money made available to CBP through the Treasury Forfeiture Fund (TFF) (31 U.S.C. § 9705)," nor has CBP requested (or does it plan to request) "that the Department of Defense provide support pursuant to 10 U.S.C. § 284 to construct any border fencing in the Laredo Sector."[9] *Id.* ¶ 6. With respect to the remaining authority challenged by RGISC—*i.e.*, § 2808, the Acting Secretary of Defense has received assessments about specific border barrier construction projects under such authority, but he has not yet decided to undertake or authorize any barrier construction projects under § 2808, let alone a specific project in the Laredo Sector where RGISC is headquartered and operates. *See* Third Rapuano Decl. ¶¶ 5-6. When authorizing § 2808 construction, the Acting Secretary will have to determine that the particular project is "necessary to support such use of the armed forces." 10 U.S.C. § 2808. That determination can only be considered within the context of the Acting Secretary authorizing a specific military construction project presented to him for approval. Moreover, in order to fund any projects under § 2808, DoD will have to defer construction of an equal amount of appropriated,

[9] Because CBP has determined that any border barrier projects in the Laredo Sector will not be funded under § 9705 or § 284, RGISC fails to satisfy the traceability and redressability prongs of Article III standing for claims challenging Defendants' use of those authorities. *See supra* § I.B.1.

but unobligated, military construction projects, and none of those decisions have been made at this time. *See id.* In light of the absence of any final decision on the use of § 2808 for any project in the Laredo Sector and the need for the development of a concrete factual record about any such decision, it would be premature for the Court to decide RGISC's claims concerning § 2808.[10] *See, e.g.*, *Ariz. Pub. Serv. Co. v. E.P.A.*, 211 F.3d 1280, 1297–99 (D.C. Cir. 2000) (holding that "there is no decision 'fit' for judicial review" where the agency "has made no decision").

RGISC will suffer no hardship if the Court withholds review at this time. *See Nat'l Park Hosp. Ass'n,* 538 U.S. at 811–12; *Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 389 (D.C. Cir. 2012). CBP has not identified a funding source for the planned barrier construction in the Laredo Sector, other than to determine that such construction will not utilize funding under § 9705 or § 284. Until a funding source is identified, CBP will not initiate its standard procedures of "formally [contacting] landowners within the proposed barrier alignment to begin the process of surveying, appraising, and eventually acquiring land in the finalized alignment." Flossman Decl. ¶ 5.

Because claims as to future construction in the Laredo Sector are not fit for judicial decision and there is no hardship from delaying review, RGISC's unripe claims should be dismissed.

4. The Remaining Organizational Plaintiffs Fail to Plead a Legally Cognizable Injury-in-Fact.

The remaining organizational plaintiffs—LCLAA, CalWild, and GreenLatinos—lack

[10] In a related case presenting similar challenges to the Executive's funding of border barrier construction, the court held that the plaintiffs had standing for their § 2808 claims. *Sierra Club v. Trump*, 2019 WL 2247689, at *15 (N.D. Cal. May 24, 2019). *Sierra Club* found that the plaintiffs had "demonstrated that their members span the entire U.S.-Mexico border," thus making it "highly unlikely," in the court's view, that the Acting Secretary may use his § 2808 authority to fund construction in locations where the plaintiffs could not claim a cognizable injury. *Id.* at *16. The court, however, denied preliminary relief on the § 2808 claims because Plaintiffs did not show a likelihood of irreparable harm from § 2808-funded construction in "as-yet-unspecified locations." *Id.* at *25, 29. RGISC's claims are geographically-limited to a discrete project in one sector of the southern border. The risk of imminent future injury is thus even more speculative here.

standing because they fail to allege a cognizable injury to their organization's activities. To establish Article III standing on its own behalf, an organization must meet the familiar standing requirements that apply to individuals: (1) injury in fact; (2) causation; and (3) redressability. *See, e.g.*, *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995). The necessary facts "must affirmatively appear in the record" and "cannot be inferred argumentatively from averments in the pleadings." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

Plaintiffs' standing claims fail at the first step of the analysis. Here, LCLAA, CalWild, and GreenLatinos were not the object of the Executive and agency actions they challenge in this suit. Instead, a generous reading of the Complaint reveals, at most, their dissatisfaction with the President's national emergency declaration and the agency Defendants' efforts to construct barriers at the southern border. *See* Compl. ¶1. But federal courts do not sit to air arguments "at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences," *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972), or to resolve "generalized grievances more appropriately addressed in the representative branches," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (citation omitted), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components*, 134 S. Ct. 1377 (2014). Thus, a "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem," is insufficient to create standing. *Sierra Club*, 405 U.S. at 739. An "organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art[icle] III." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976)).

Rather, an organization claiming Article III standing on its own behalf must demonstrate a "concrete and demonstrable injury to [its] activities." *Food & Water Watch, Inc. v. Vilsak*, 808

F.3d 905, 919 (D.C. Cir. 2015) (alteration in original) (quoting *PETA v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015)); *see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). The D.C. Circuit has set forth a two-part inquiry to determine whether an organization has pleaded a cognizable injury. First, a court must ask first whether the defendant's action "injured the [organization's] interest." *Food & Water Watch*, 808 F.3d at 919. To allege such an injury, the organization must show that the defendant's conduct "perceptibly impaired [its] ability to provide services" or, in other words, "inhibit[ed] . . . [its] daily operations." *Id.* If the organization shows "an initial impairment to its programs," *Ctr. for Responsible Sci. v. Gottlieb*, 346 F. Supp. 3d 29, 41 (D.D.C. 2018), the court must next determine "whether the organization used its resources to counteract that harm," *Food & Water Watch*, 808 F.3d at 919. A diversion of the organization's resources "cannot alone constitute the harm. Holding otherwise would be hopelessly circular." *Ctr. for Responsible Sci.*, 346 F. Supp. 3d at 41.

In *Food & Water Watch*, the D.C. Circuit held that an organization that advocated for safe food systems failed to demonstrate a cognizable organizational injury and thus lacked standing to challenge poultry-inspection regulations promulgated by USDA. *Food & Water Watch*, 808 F.3d at 921. Food & Water Watch (FWW) alleged that the new regulations injured the organization by causing it to increase the resources it spent on educating the public and its members about the regulation's alleged negative effects and encouraging its members to avoid certain poultry products. *Id.* at 920. The Court held that FWW alleged "nothing more than an abstract injury to its interests," and that its alleged increased expenditure of resources did not demonstrate that its "organizational activities ha[d] been perceptibly impaired in any way." *Id.* at 921. By contrast, the D.C. Circuit in *PETA v. USDA* held that PETA (an animal-welfare group) established standing to challenge the USDA's failure to promulgate bird-specific animal welfare regulations where the

agency's inaction caused injuries "concrete and specific to the work" of PETA. 797 F.3d 1087, 1095 (D.C. Cir. 2015). In particular, the Court held that USDA's failure to apply such regulations to birds had "'perceptibly impaired [PETA's] ability' to both bring [statutory] violations to the attention of the agency charged with preventing avian cruelty and continue to educate the public," and that PETA consequently expended resources to counteract that harm. *Id.*

As in *Food & Water Watch*, the harms alleged by the organizational Plaintiffs in this case are insufficient to state a cognizable injury under D.C. Circuit precedent. LCLAA, CalWild, and GreenLatinos do not point to any independent injury caused by the President's national emergency declaration or the subsequent actions of the agency Defendants challenged in this suit. Instead, LCLAA and GreenLatinos allege that the actions in dispute "frustrate[]" their "mission and work" toward an improved immigration process. Compl. ¶¶ 13.e, 85 (LCLAA); *see id.* ¶¶ 15.f, 87 (GreenLatinos). *Food & Water Watch* made clear, however, that a showing of injury requires more than a "frustration of [the organization's] purpose" or mere allegations that the organization's "mission has been compromised." *Food & Water Watch*, 808 F.3d at 919. As the Court explained, "frustration of an organization's objectives 'is the type of abstract concern that does not impart standing.'" *Id.*; *see Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011) ("a mere setback to [an organization's] abstract social interests" is not a cognizable injury for Article III standing); *see Int'l Academy of Oral Medicine & Toxicology v. FDA*, 195 F. Supp. 3d 243, 256-57 (D.D.C. 2018) ("mission conflict . . . alone does not confer standing").

Plaintiffs' alleged diversion-of-resources injury fares no better. The Complaint plainly fails to allege that the Proclamation or the challenged agency actions have "inhibit[ed] [Plaintiffs'] daily operations." *Food & Water Watch*, 808 F.3d at 919. Plaintiffs merely claim that they have diverted resources away from other work that furthers their mission in order to "oppose" the

Executive's efforts to construct border walls—advocacy activities that Plaintiffs regard as at the core of their missions. *See* Compl. ¶¶ 13.a, 13.c, 13.f, 85 (LCLAA); *see id.* ¶¶ 14.a, 14.c, 14.g, 86 (CalWild); *see id.* ¶¶ 15.a-b, 15.f, 87 (GreenLatinos). Allegations that an organization has reallocated resources to advocate or litigate against a government policy or action is insufficient for Article III purposes. *Food & Water Watch*, 808 F.3d at 919. "[S]uch budgetary choices merely reflect [the organization's] shifting priorities"—a type of harm that D.C. Circuit precedent has long held "amounts to a 'self-inflicted' wound." *New England Anti-Vivisection Soc. v. U.S. Fish & Wildlife Serv.*, 208 F. Supp. 3d 142, 167 (D.D.C. 2016) (quoting *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) and *Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015)). And courts in this Circuit have repeatedly rejected similar standing claims grounded on pure issue-advocacy activities where, as here, an organization only states "a sincere and strong objection to the challenged government action and a stated intention to use [its] resources to oppose it." *Id.* at 164 (non-profit animal welfare group's expenditures to thwart challenged action were insufficient to establish organizational standing).[11]

Although any diversion of resources by LCLAA, CalWild, and GreenLatino may be relevant to the second step of the D.C. Circuit's organizational standing inquiry—"whether the organization used its resources to counteract [the alleged] harm," *Food & Water Watch*, 808 F.3d at 919, Plaintiffs have not made the initial showing that their "organizational activities have been [harmed] in any way," *id.* at 921. A mere diversion of resources on its own, as Plaintiffs have

[11] *See also, e.g.*, *Food & Water Watch*, 808 F.3d at 921; *Turlock Irr. Dist.*, 786 F.3d at 24 (expenditure of resources to oppose agency decision in administrative proceedings is not a cognizable organizational injury); *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 (D.C. Cir. 2005) (increased lobbying costs is not a cognizable organizational injury); *Int'l Academy of Oral Medicine & Toxicology*, 195 F. Supp. 3d at 256-58 (diversion of resources to advocate against a final agency rule did not constitute Article III injury).

pleaded, is inadequate to meet Article III's standing requirement. *Ctr. for Responsible Sci.*, 346 F. Supp. 3d at 41. Plaintiffs thus fall well short of their burden to establish a cognizable injury to their own interests, and their claim of organizational standing should be rejected out of hand.[12]

II. Plaintiffs Have Not Satisfied the APA's Threshold Requirements for Review of Agency Action.

Plaintiffs claim, under the APA, that border barrier construction utilizing funds pursuant to § 9705, § 284, and § 2808 exceeds statutory authority and is arbitrary and capricious. Compl. ¶¶ 116–17. But the challenge to the use of § 9705 and § 2808 fail at the threshold of APA review for two reasons. First, Plaintiffs fail to allege "final agency action" with respect to § 2808 for the Court to review, as required under the APA. 5 U.S.C. § 704. Second, any decision by DoD to engage in construction under § 2808 or determination by the Treasury Secretary to distribute TFF funds (§ 9705) for law enforcement activities would be of a sort "committed to agency discretion by law" and thus excluded from judicial review by the APA. 5 U.S.C. § 701(a)(2).

A. No "Final Agency Action" Exists With Respect to § 2808.

Because § 2808 does not directly provide for judicial review, APA review, if available at all, is permitted only if there has been "final agency action." *See, e.g.*, *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 882 (1990); *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003). Final agency action is marked by two characteristics. First, final agency action "mark[s] the consummation of the agency's decisionmaking process"; it is not

[12] LCLAA, CalWild, and GreenLatinos do not purport to bring this suit in their representational capacities and, even assuming they did, their allegations are patently insufficient to establish standing under such theory. To establish "representational" (or "associational") standing to sue on behalf of its members, an association must show that (1) at least one of its members has standing to sue in his own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither litigation over the claim asserted nor the relief sought requires the participation of an individual member. *Interstate Nat. Gas Ass'n of Am. v. FERC*, 494 F.3d 1092, 1095 (D.C. Cir. 2007). Plaintiffs fail, at minimum, on the first prong. They make no effort to name any member allegedly harmed by border barrier construction undertaken pursuant to the challenged authorities.

"tentative" or "interlocutory." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). Second, the action "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (internal citation omitted). This requires a final agency action to have "an actual or immediately threatened effect." *Nat'l Wildlife Fed.*, 497 U.S. at 894. Thus, preparatory activities, without more, are not final agency action under the APA. *See, e.g.*, *Reliable Automatic Sprinkler*, 324 F.3d at 731 (finding "a statement of the agency's intention to make a preliminary determination" was not final agency action).

Here, Plaintiffs have failed to allege any action that represents the consummation of DoD's decisionmaking process with respect to § 2808. To the contrary, they assert only that "[o]n information and belief, DOD is formulating a plan for reallocating funds from DOD military construction projects to border wall construction." Compl. ¶ 115. But "formulating a plan" demonstrates preparation for possible future action, not final action. Such preparatory actions do not have "an actual or immediately threatened effect." *Nat'l Wildlife Fed.*, 497 U.S. at 894. And the APA does not entitle Plaintiffs to challenge any decision by the Acting Secretary of Defense until it is final.

B. Even If There Were Final Agency Action, the Use of § 2808 Authority Is Committed to Agency Discretion by Law.

Even if there were final agency action, any decision by the Acting Secretary of Defense to undertake military construction under § 2808 is not reviewable because it is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Under the APA, the Court may not review final agency action "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action." *Legal Assistance for Vietnamese*

Asylum Seekers v. Dep't of State, Bureau of Consular Affairs, 104 F.3d 1349, 1353 (D.C. Cir. 1997) (quoting *Heckler*, 470 U.S. at 830). The determination of whether a matter has been committed to agency discretion takes into account "both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) (quoting *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006)). This Court has held that determinations requiring military expertise and those dealing with foreign policy issues are not proper subjects of judicial intervention. *See, e.g.*, *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 41–42 (D.C. Cir. 2000) (determinations regarding "military value" and "judgments on questions of foreign policy and national interest" are "not subjects fit for judicial involvement"); *NFFE v. United States*, 905 F.2d 400, 406 (D.C. Cir. 1990) ("[T]he federal judiciary is ill-equipped to conduct reviews of the nation's military policy.").

The text of § 2808 makes clear that there is no meaningful standard by which to judge any decision by the Acting Secretary of Defense to exercise his authority. The use of § 2808 is predicated on a *Presidential declaration* of a national emergency "that requires the use of the armed forces," and provides the Secretary of Defense with authority to "undertake military construction projects" that are "necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). The statutory scheme leaves to the President the determination of whether a national emergency "requires use of the armed forces," and courts have uniformly concluded that a Presidential declaration of a national emergency is a nonjusticiable political question. *See supra* § I.A.2. The fact that § 2808 imposes an additional requirement that the national emergency "require[] use of the armed forces" does not change the conclusion that this determination is nonjusticiable. The Commander-in-Chief's decision to deploy the armed forces to address a

national emergency is a quintessential political question. "'To attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters constitutionally given to the [other] branch[es].'" *Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154, 1160 (D.D.C. 1991) (quoting *In re Korean Air Lines Disaster of Sept. 1*, 597 F. Supp. 613, 616 (D.D.C. 1984)), *aff'd on other grounds*, 957 F.2d 886 (D.C. Cir. 1992); *Ange v. Bush*, 752 F. Supp. 509, 512 (D.D.C. 1990) (finding nonjusticiable a challenge to the President's deployment orders and activities in the Persian Gulf). Here, the Court is without judicially manageable standards to evaluate the President's determination to deploy the armed forces to the southern border. "[C]ourts lack the competence to assess the strategic decision to deploy" the armed forces "or to create standards to determine" whether the use of the armed forces "was justified or well-founded." *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 844.

The statute likewise gives significant discretion to the Acting Secretary of Defense, providing only that, in the event of a declaration of national emergency, the Secretary "may" authorize military construction projects "that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). This is a quintessential military judgment, and the statute does not specify any criteria that the Secretary must consider in making his determination. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments . . . ."). Nor does it include any specific prohibitions limiting the Secretary's determination of what would constitute a project "necessary" to support the use of the armed forces. *See Sierra Club*, 648 F.3d at 856 (finding administrative action unreviewable where, among other things, "[t]here [was] no guidance to the Administrator or to a reviewing court as to

what action is 'necessary'").

Even if § 2808 contained "standards to apply," such standards would not be "judicially manageable" because the determination regarding what is "necessary to support such use of the armed forces" is an inherent military judgment to which courts have routinely deferred. *See North Dakota v. United States*, 495 U.S. 423, 443 (1990) ("[W]e properly defer to the judgment of those who must lead our Armed Forces in battle."); *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the Army."). Judicial review of any decision by the Acting Secretary of Defense to authorize border barrier construction under § 2808 as necessary to support the use of the armed forces would necessarily require this Court to second-guess the Acting Secretary's considered judgment on core military matters such as allocation of military resources, readiness, and the relative value of various military construction projects within the military's global national security strategy. There are no judicially manageable standards for conducting that type of review. *See NFFE*, 905 F.2d at 405–06 (concluding that decisions about which military bases to close were committed to agency discretion by law). Such judgment is "better left to those more expert in issues of defense," *id.* at 406, and inherently requires a determination of the "military value" of the proposed construction projects. *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n*, 215 F.3d at 41–42. For these reasons, there are no judicially manageable standards to apply, and any determination by the Acting Secretary regarding the use of § 2808 will be committed to agency discretion by law under the APA.

C. The Use of § 9705 Authority Is Committed to Agency Discretion by Law.

Treasury's decision to allocate TFF funds is likewise committed to agency discretion by law and is thus unreviewable under the APA. 5 U.S.C. § 701(a)(2). The Supreme Court has recognized that an agency's decision to allocate funds in a particular way is an unreviewable exercise of discretion because the agency must be allowed to administer its statutory

responsibilities "in what it sees as the most effective or desirable way." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). Moreover, courts are not well equipped to review the "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise: whether its resources are best spent on one program or another; whether it is likely to succeed in fulfilling its statutory mandate; whether a particular program best fits the agency's overall policies; and, indeed, whether the agency has enough resources to fund a program at all." *Id.* at 193. Even where Congress has dictated that funds be spent for a specific purpose, so long as it "left to the [agency's] sole judgment" the determination of the allocation of funds, the APA prohibits judicial review of how funds are allocated, *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 751 (D.C. Cir. 2002), if the allocation "meet[s] permissible statutory objectives," *Lincoln*, 508 U.S. at 193.[13]

As in *Lincoln* and *Milk Train*, Congress provided Treasury with broad authority to administer the TFF. After the mandatory categories of expenses have been satisfied, *see* 31 U.S.C. § 9705(a)(1)(A), and funds have been reserved for these mandatory expenses in the next year, *see Id.* § 9705(g)(1), (3)(C), (4)(b), the Secretary has wide discretion to use the remaining funds "in connection with the law enforcement activities of any Federal agency." 31 U.S.C. § 9705(g)(4)(B). Nothing in the statute prohibits using these funds or constrains the agency's decision to use these funds for border barriers. And, as explained further below, the construction of border barriers to stem the flow of illegal immigration and drugs is unquestionably a law enforcement activity. *See*

[13] In *State of California v. Trump*, another related case pending before the same district judge as *Sierra Club*, the court held that Treasury's use of its § 9705 authority to transfer funds for border barrier construction is judicially reviewable and that *Lincoln* is inapposite because "the TFF arguably does not qualify as the sort of lump-sum appropriation present in *Lincoln*." *State*, 2019 WL 2247814, at *13 (N.D. Cal. May 24, 2019) (denying preliminary relief on the plaintiffs' TFF claims because the plaintiffs failed to show irreparable harm absent an injunction). The D.C. Circuit in *Milk Train* did not read *Lincoln* that narrowly and extended *Lincoln*'s reasoning to an agency decision that did not involve a lump sum appropriation. *Milk Train*, 310 F.3d at 751.

infra 51-52. Thus, funding the construction of border barriers is consistent with the statutory purposes of the TFF, such that the allocation of funds for this purpose is unreviewable.

III. Plaintiffs Have Not Stated a Statutory Claim.

Plaintiffs claim pursuant to the APA that the agency Defendants' use of § 9705, § 284, and § 2808 for border barrier construction is arbitrary and capricious and exceeds statutory authority under § 9705, § 284, § 2808, and the CAA.[14] *See* 5 U.S.C. § 706(2); Compl. ¶¶ 111–18. But they offer no concrete allegations to support the claim that Defendants acted arbitrarily and capriciously. Nor do they allege plausible violations of the statutory schemes challenged. Accordingly, Count Four should be dismissed.

Plaintiffs alternatively seek nonstatutory review of Defendants' actions as ultra vires in violation of the NEA, § 9705, § 284, § 2808, and the CAA. *See* Compl. ¶¶ 89–97. But the President's declaration of a national emergency is nonjusticiable, *see supra* § I.A.1-2, and the standard to state an ultra vires claim under a nonstatuory, implied cause of action is even more demanding than that of the APA, *see Sears, Roebuck & Co. v. USPS*, 844 F.3d 260, 265 (D.C. Cir. 2016). As a result, ultra vires claims "rarely succeed." *Nyunt v. Chairman, Broad. Bd. of Govs.*, 589 F.3d 445, 449 (D.C. Cir. 2009). Thus, for the same reasons that Plaintiffs fail to state an APA claim, Plaintiffs' ultra vires claims fail, and Count One should be dismissed.

A. Plaintiffs Fail To State a Claim Under the APA.

Plaintiffs fail to state a claim upon which relief can be granted under the APA. They offer no allegation whatsoever that Defendants acted arbitrarily and capriciously by "rel[ying] on factors which Congress has not intended [them] to consider, entirely fail[ing] to consider an important

[14] Plaintiffs also allege, pursuant to the APA, that Defendants' actions "violate the Appropriations Clause and the separation of powers laid out in Articles I and II of the Constitution." Compl. ¶ 116. This component of Plaintiffs' APA claim is addressed in Section IV, *infra*.

aspect of the problem, or offer[ing] an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Instead, Plaintiffs allege that Defendants "acted arbitrarily and capriciously in failing to articulate how [their use of statutory authorities] will address the circumstances allegedly giving rise to the national emergency." Compl. ¶ 117. This statement is not only conclusory, but also fails to recognize that neither use of § 9705 nor use of § 284 is predicated on a national emergency declaration. *See* 31 U.S.C. § 9705; 10 U.S.C. § 284. For these reasons, Plaintiffs have not adequately alleged that Defendants acted arbitrarily or capriciously.

Nor do Plaintiffs plausibly allege that "the statutory text forecloses [Defendants'] assertion of authority." *City of Arlington v. FCC*, 569 U.S. 290, 301 (2013). To the contrary, Defendants have acted consistent with their statutory mandate with respect to § 9705, § 284, and § 2808. Nor have Defendants violated the CAA.

1. 31 U.S.C. § 9705

Plaintiffs' allegations are insufficient to support an APA claim that Defendants exceeded their statutory authority with respect to the TFF. Plaintiffs allege that § 9705 "restricts use of [TFF] funds to specified purposes and construction of a border wall does not meet the requirements of the statute." Compl. ¶ 96. As Plaintiffs recognize, however, § 9705(g)(4)(B) authorizes the Secretary of the Treasury to distribute TFF funds not only for the specific purposes listed in § 9705(a), but also for "obligation or expenditure in connection with the law enforcement activities of any Federal agency." 31 U.S.C. § 9705(g)(4)(B); Compl. ¶ 36. That construction of a border wall is not specifically listed in § 9705(a) is irrelevant to the determination of whether the Treasury Secretary lawfully exercised this authority to distribute TFF funds for law enforcement activities.

Plaintiffs do not contest that construction of a barrier at the border is a law enforcement activity. Nor could they. CBP was established to "ensure the interdiction of persons and goods

illegally entering or exiting the United States," "interdict . . . persons who may undermine the security of the United States," and "safeguard the borders of the United States," among other duties. 6 U.S.C. § 211(c)(2), (5), (6); *see Arizona*, 567 U.S. at 397. Moreover, Congress has recognized that barriers prevent unlawful entries by aliens and smuggling of contraband across the border, *see* Secure Fence Act of 2006, Pub. L. No. 109-367, §§ 2–3, 120 Stat. at 2638–39, and thus help enforce the laws that prohibit such activities, *e.g.*, 8 U.S.C. § 1325 (improper entry by an alien); 18 U.S.C. § 545 (smuggling goods); 21 U.S.C. § 865 (smuggling methamphetamine).

2. 10 U.S.C. § 284

Nor have Plaintiffs pleaded facts sufficient to infer plausibly that Defendants have violated 10 U.S.C. § 284. Plaintiffs allege that "Defendants have not identified particular drug smuggling corridors requiring construction of a wall at the border." Compl. ¶ 95. This is simply untrue.

Section 284 permits DoD to "provide support for the counterdrug activities" of federal law enforcement agencies through, among other things, "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." Here, it is a matter of judicially-noticeable fact that DHS requested, and DoD has agreed to provide, support to DHS in constructing barriers in specific drug smuggling corridors. *See, e.g.*, Determination Pursuant to § 102 of IIRIRA, 84 Fed. Reg. 17185–87 (Apr. 24, 2019); Determination Pursuant to § 102 of IIRIRA, 84 Fed. Reg. 17187–88 (Apr. 24, 2019). As DHS has explained in publications in the Federal Register, the specific areas in the vicinity of the United States border where DoD has agreed to provid support for DHS's barrier construction efforts have been identified as areas of high levels of illegal entry of people and drugs. *See* 84 Fed. Reg. at 17186 (explaining that thousands of pounds of drugs were seized in the U.S. Border Patrol's Yuma Sector in 2018 and pointing out that, in 2018, the U.S. Border Patrol had "over 700 separate drug-related events between border crossings in the El Paso Sector"); 84 Fed. Reg. at 17188 ("in fiscal

year 2018, the Border Patrol had over 1,400 separate drug-related events between border crossings in the Yuma Sector, through which it seized" thousands of pounds of illegal drugs)). DHS has identified the exact locations of these drug smuggling corridors. *See id.* Because these judicially noticeable facts contradict the Complaint's allegation that Defendants have not identified drug smuggling corridors as required under § 284, the Court is not required to accept this allegation as true. *See Kaempe*, 367 F.3d at 963 ("Nor must we accept as true the complaint's factual allegations insofar as they contradict exhibits to the complaint or matters subject to judicial notice."). Plaintiffs allege no other violation of § 284 and thus have failed to state a claim.

3. 10 U.S.C. § 2808

Even putting aside the threshold issue that Plaintiffs have not alleged final agency action for § 2808, *see supra* § III.A, their APA claim fails because Plaintiffs cannot support their allegation that DoD exceeded its statutory authority. Plaintiffs allege that by "formulating a plan for reallocating funds from DOD military construction projects to border wall construction," Compl. ¶ 115, DoD is violating the APA with respect to § 2808 because the underlying emergency does not "require use of the armed forces," border barriers are not a "military construction project[]," and that any such project is not "necessary to support such use of the armed forces," *id.* ¶ 94. As to the first and third claims, the President's determination that a national emergency "requires use of the armed forces" is a nonjusticiable political question, and a determination by the Acting Secretary of Defense that specific construction projects would be "necessary to support such use of the armed forces" is vested in the expertise of the Acting Secretary, and both are thus committed to agency discretion by law. *See supra* §§ II.A.1-2; II.B. Because the statute provides no judicially manageable standards, Plaintiffs cannot plausibly allege a § 2808 violation.

Nor can Plaintiffs plausibly allege that Defendants have violated § 2808's other statutory requirements. Although "military construction project" is a statutorily defined term, its definition

is broad and illustrative, not specific or exclusive. *See* 10 U.S.C. § 2801(b). The term "military construction" is broadly defined to "*include*[] any construction . . . of any kind carried out with respect to a military installation." *Id.* § 2801(a) (emphasis added). A "military installation," in turn, "means a base, camp, post, station, yard, center, *or other activity* under the jurisdiction of the Secretary of a military department." *Id.* § 2801(c)(4) (emphasis added). This broad definition of military construction as "includ[ing]" (but not limited to, *see* 10 U.S.C. § 101(f)(4)) construction with respect to a military installation, and defining a military installation to include non-specified "other activity," does not "foreclose" the inclusion of border barrier construction. *See City of Arlington*, 569 U.S. at 301. In the face of such expansive statutory language, Plaintiffs offer no factual allegations whatsoever as to why border barrier construction under § 2808 would not constitute a military construction project. Without such allegations, Plaintiffs have provided "nothing more than conclusions" unsupported by factual allegations. *Twombly*, 556 U.S. at 679. Their § 2808 claim cannot survive a motion to dismiss.[15] *See id.*

4. The Consolidated Appropriations Act

Plaintiffs also fail to state a claim under the APA that Defendants' actions violate the CAA. They allege that Defendants' use of § 9705, § 284, and § 2808 for border barrier construction exceeds the CAA's "specific limits on appropriations for border fencing, the location of new fencing, and the design of new fencing." Compl. ¶ 91. Plaintiffs impermissibly ignore "plain and unambiguous" statutory language. *See Sherley v. Sebelius*, 644 F.3d 388, 400 (D.C. Cir. 2011).

Section 230(a) of the DHS Act, which is part of the CAA, provides that "[o]f the total amount made available under 'U.S. Customs and Border Protection—Procurement, Construction,

[15] Although *Sierra Club* noted in dicta "concerns" with Defendants' statutory arguments, it did not address the merits of the plaintiffs' § 2808 claims and denied their request for preliminary relief on such claims. *Sierra Club*, 2019 WL 2247689, at *25.

and Improvements,'" $1.375 billion "shall be available only," as relevant here, for "the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector." Pub. L. No. 116-6, div. A, § 230(a). By their plain terms, these provisions limit DHS's use of funds for border barrier construction. But they do no more.

Contrary to Plaintiffs' claims, Congress's decision not to appropriate to DHS the full amount of funds requested by the President for fiscal year 2019 border barrier construction does not limit other agencies' ability to utilize other available statutory authorities for such construction. "An agency's discretion to spend appropriated funds is cabined only by the text of the appropriation." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012) (quotation omitted). Plaintiffs have identified no restriction in the CAA on the funding of border barrier construction pursuant to other statutory authorities, nor does its plain text include one. *See generally* Pub. L. No. 116-6. Congress did not modify any of the statutes at issue here in the CAA. *See id.* And the CAA's funding provisions do not otherwise alter the meaning or availability of permanent statutes already in effect. *See Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984) ("[W]hen appropriations measures arguably conflict with the underlying authorizing legislation, their effect must be construed narrowly."); *see also Building & Const. Trades Dep't., AFL-CIO v. Martin*, 961 F.2d 269, 273–74 (D.C. Cir. 1992).

Had Congress wanted to restrict all other border barrier construction—including construction where other statutory authorities authorized funding—it could have done so by imposing appropriations riders, as it has done in the past, including elsewhere in the very same appropriations act. *See, e.g.*, Pub. L. No. 116-6, Div. A, § 219 ("None of the funds made available to the United States Secret Service by this Act or by previous appropriations Acts may be made available for the protection of the head of a Federal agency other than the Secretary of Homeland

Security . . . ."). The President made clear prior to the CAA's passage his intention to use alternative statuory sources to fund barrier construction, *see* Compl. ¶¶ 46–47, 53, but Congress nonetheless included no rider forbidding it. At bottom, absent language to the contrary, the grant of a specific appropriation does not restrict the use of other funds appropriated to other agencies for similar purposes pursuant to other statutory authority.

Nor have Plaintiffs alleged a violation of any other provision of the CAA. The DHS Act provides that barriers constructed using the $1.375 billion appropriation to CBP are required to be "operationally effective designs . . . such as currently deployed steel bollard." *Id.* § 230(b). Other provisions in the Act further restrict the use of DHS appropriated funds for border barrier construction, prohibiting barrier construction using any past or current DHS appropriations in five specific areas in the Rio Grande Valley, *see id.* § 231, and requiring consultation prior to use of the $1.375 billion in funds appropriated to CBP for barrier construction in five cities or census designated places, *id.* § 232. Plaintiffs' claim that Defendants violated these provisions fails for two reasons. First, by their plain terms, these provisions do not apply to any barrier construction funded by Treasury or DoD funds. The restriction on the design of barriers to be used and the consultation requirement explicitly apply only to the funds appropriated to CBP. *See id.* § 230(b) (applying design restriction to "[t]he amounts designated in subsection (a)(1)"); § 232 (applying consultation requirement to "any funds made available by this Act for construction of physical barriers"). The prohibition on the construction of pedestrian fencing in five designated areas in the Rio Grande Valley applies to use of "funds made available by this Act or prior Acts," limiting the restriction to DHS appropriations. *See id.* § 231. Plaintiffs cannot state a claim that the use of funds appropriated to Treasury or DoD for barrier construction violates these provisions when the provisions themselves limit their applicability to DHS appropriations.

But even if this were not the case, Plaintiffs' claim fails for a second reason: they have not alleged any violation of these provisions. The Complaint includes no concrete allegation that Defendants have utilized any barrier design other than that designated in the DHS Act; it does not allege that Defendants have constructed barriers without prior consultation in any of the five cities or census designated places identified in the DHS Act; nor does it allege that Defendants have engaged in any construction of pedestrian fencing, using any source of funding, in the five specified locations in the Rio Grande Valley in which the DHS Act prohibits such construction. For these reasons, Plaintiffs have failed to state a claim for violation of the CAA.

B. Plaintiffs' Ultra Vires Claims Must Be Dismissed.

In the event that the Court agrees that Plaintiffs' statutory claims are unreviewable under the APA, Plaintiffs claim that alleged violations of § 9705, § 284, § 2808, and the CAA may be reviewed under a nonstatuory right of action for agency activities that are ultra vires. As Plaintiffs seem to concede, the Court can only reach the merits of the ultra vires claims if APA review is unavailable. *See Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43–44 (1991) (citing *Leedom v. Kyne*, 358 U.S. 184 (1958)) (review under an independent ultra vires cause of action is available only where the plaintiff would otherwise be "wholly deprive[d]" of a "meaningful and adequate means of vindicating its statutory rights").

Should the Court apply the ultra vires framework here, Plaintiffs' ultra vires claims fail for the same reason as their APA claims: their allegations do not plausibly allege a violation of the statute. Indeed, the scope of ultra vires review is narrower than that of APA review. *See Sears, Roebuck & Co.*, 844 F.3d at 265 ("The scope of non-APA review is narrow."). Courts review ultra vires claims under a "very stringent standard" and such claims "rarely succeed." *Nyunt*, 589 F.3d at 449; *see also Trudeau v. FTC*, 456 F.3d 178, 189–90 (D.C. Cir. 2006). To give rise to such a claim, the agency must "patently . . . misconstru[e]" a statute, "disregard[] a specific and

unambiguous statutory directive," or "violate[] some specific command of a statute." *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988) (internal citations and quotation marks omitted). Unless an agency has violated a "clear and mandatory" statutory provision, ultra vires review is not warranted.[16] *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. FSIP*, 437 F.3d 1256, 1263 (D.C. Cir. 2006) (quoting *Leedom*, 358 U.S. at 188). Mere allegations that the agency improperly exercised its authority are not enough to justify ultra vires review. *See, e.g.*, *Mittleman v. Postal Regulatory Comm'n,* 757 F.3d 300, 307–08 (D.C. Cir. 2014). Because the standard to state an ultra vires claim is more demanding, for the same reasons Plaintiffs fail to state an APA claim that Defendants exceeded statutory authority, *see supra* § III.A, they have not alleged the violation of a clear and mandatory statutory provision. The ultra vires claims should be dismissed.

IV. Plaintiffs' Constitutional Claims Must Be Dismissed.

Plaintiffs raise constitutional challenges to the Executive and agency actions at issue here. But these counts merely recast Plaintiffs' statutory claims in constitutional terms, and "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims." *Dalton*, 511 U.S. at 473. The Government is not relying on independent Article II authority in order to undertake border construction; the actions alleged are being undertaken pursuant to statutory authority alone. The President did not seek to reallocate appropriated funds based upon any claim of inherent constitutional authority. Nor did the President claim that the declaration of a national emergency gave him any authority that had not been expressly conferred by Congress. Rather, the Government relies solely upon available statutory authorities that

[16] *Sierra Club* incorrectly found that "*ultra vires* review exists outside the APA framework" and that the "heightened standard for *ultra vires* review" did not apply to the plaintiffs' claims. *Sierra Club*, 2019 WL 2247689, at *17. Unlike that court, the D.C. Circuit has recognized that non statutory review is of "extremely limited scope" and presents a "more difficult course for [Plaintiffs] than would review under the APA," indicating that at least some higher level of scrutiny is appropriate. *Trudeau*, 456 F.3d at 190.

Congress has delegated to the Executive. The outcome of this case thus turns on whether the statutes at issue authorize Defendants' actions. Because disagreements about how to construe statutes do not raise constitutional problems, Counts Two and Three should be dismissed.

Dalton disposes of Plaintiffs' constitutional claims. In *Dalton*, the Supreme Court specifically rejected the proposition that "whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Id.* at 471. The Court instead recognized that the "distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other, is too well established to permit this sort of evisceration." *Id.* at 474.

By asserting that actions that allegedly exceed statutory authority are, for that reason alone, constitutional violations, the Complaint does precisely what the Court disapproved of in *Dalton*. Plaintiffs assert no constitutional violation separate from the alleged statutory violations. They do not allege that Defendants' compliance with the statutes at issue would be unconstitutional; they assert that Defendants violated the statutes. Plaintiffs' Appropriations Clause claim is predicated on the allegation that Defendants violated alleged "specific limits on appropriations for border fencing, the location of new fencing, and the design of new fencing." Compl. ¶ 102. The fact that this is a claim of statutory, not constitutional, violations is made plain by the fact that Plaintiffs also state this allegation verbatim in support of their ultra vires claim. *See id.* ¶ 91. Plaintiffs' separation-of-powers claim likewise depends on the claim that the Executive and agency actions undertaken pursuant to statute violate the CAA. *See id.* ¶ 110. These bare allegations of ultra vires statutory actions do not state constitutional claims. *See Dalton*, 511 U.S. at 473–74.

Plaintiffs do not allege that the President has exercised his inherent authority under Article II of the Constitution. Nor does the President purport to do so. This case stands in sharp contrast

to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the President issued an order directing the Secretary of Commerce to seize the nation's steel mills relying solely upon "the aggregate of his powers under the Constitution," thus conceding a lack of statutory authority. *Id.* at 585–87. The Court held the action unconstitutional. *Id.* at 589. In concurrence, Justice Jackson emphasized that the President had acted in the absence of congressional authorization, where his "power is at its lowest ebb" and such exercise of power must be "scrutinized with caution." *Id.* at 637–38 (Jackson, J., concurring). Here, however, the President and his agents are acting "pursuant to an express . . . authorization of Congress," the situation in which "his authority is at its maximum." *Id.* at 635 (Jackson, J., concurring). *Youngstown* is therefore inapposite. *See AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc); *see also Dalton*, 511 U.S. at 473.

If Plaintiffs' allegations were found to rise to the level of constitutional issues, then *every* allegation that the President or his agents exceeded their statutory authority in some way could be repleaded as a constitutional separation-of-powers claim. The Supreme Court has foreclosed such tactics, recognizing their inconsistency with well-established precedent "distinguish[ing] between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Dalton*, 511 U.S. at 472. Because where "the President concedes . . . that the only source of his authority is statutory, no constitutional question whatever is raised," this Court should dismiss all constitutional counts. *Id.* at 474 n.6 (internal quotation marks omitted).

CONCLUSION

For these reasons, Plaintiffs' Complaint should be dismissed in full pursuant to Rules 12(b)(1) and 12(b)(6).[17]

[17] This judicial district does not provide a procedure to notice a motion on the Court's calendar for a hearing; however, upon the completion of briefing, Defendants stand ready to appear for argument at the Court's earliest convenience.

Dated: May 31, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

JAMES M. BURNHAM
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ *Andrew I. Warden*
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Counsel for Defendants

EXHIBIT 1

SECOND DECLARATION OF LOREN FLOSSMAN

I, Loren Flossman, declare as follows:

1. I am the Acquisition Program Manager for the Wall Program Management Office (Wall PMO), U.S. Border Patrol Program Management Directorate, U.S. Customs and Border Protection (CBP), an agency of the Department of Homeland Security (DHS). I have held this position since May 2018. Prior to this, I was the Director of the Border Patrol & Air and Marine Program (BPAM) Management Office within the Office of Facilities and Asset Management, CBP. BPAM is the office within CBP that historically was responsible for the construction and maintenance of facilities, tactical infrastructure, and border infrastructure such as barriers and roads that are required by the United States Border Patrol (Border Patrol) or CBP Air and Marine. Responsibility for border barrier projects was transferred from BPAM to Wall PMO. Therefore, Wall PMO is now responsible for border barrier projects, including the border barrier projects that are ongoing or being planned for the Rio Grande Valley sector.
2. The statements in this declaration are based on my personal knowledge and information that I have received in my official capacity.

Funding of Border Barrier Construction in the Rio Grande Valley Sector

3. CBP is a U.S. Government Agency responsible for securing the Nation's borders. CBP's mission is to prevent terrorists and terrorist weapons from entering the United States, and to detect, interdict, and apprehend those who attempt to enter illegally or smuggle any person or contraband across the Nation's borders. CBP is specifically responsible for patrolling nearly 6,000 miles of Mexican and Canadian international land

borders and over 2,000 miles of coastal waters surrounding the Florida Peninsula and the island of Puerto Rico.

4. CBP divides its enforcement zones along the southern border with Mexico into nine sectors. From west to east, the sectors are: San Diego, El Centro, Yuma, Tucson, El Paso, Big Bend, Del Rio, Laredo, and Rio Grande Valley (RGV).

5. The RGV covers more than 34,000 square miles of southeast Texas and includes the following Texas counties: Cameron, Willacy, Hidalgo, Starr, Brooks, Kenedy, Kleberg, Nueces, San Patricio, Jim Wells, Bee, Refugio, Calhoun, Goliad, Victoria, DeWitt, Jackson, Matagorda, Brazoria, Galveston, Chambers, Jefferson, Wharton, Fort Bend, Colorado, Austin, Waller, Montgomery, Liberty, Hardin, Orange, Harris, Aransas, and Lavaca. Border Patrol in the RGV is responsible for securing approximately 300 river miles along the Rio Grande River separating the United States and Mexico as well as approximately 300 miles of coast along the Gulf of Mexico.

6. The RGV currently has approximately 54.9 miles of border barrier. This mileage is predominantly steel bollard, levee wall systems but also includes steel bollard, pedestrian wall systems.

7. The barrier projects, both planned and ongoing, in the RGV are for levee and pedestrian barrier systems. The wall system includes steel bollards, a 150-foot enforcement zone on the river side of the wall system, detection and surveillance technology, vehicle and pedestrian gates, lighting, and an all-weather road running parallel to the barrier.

8. All barrier construction projects currently ongoing or planned in the RGV are or will be funded from one of three sources: (1) CBP's Fiscal Year 2018 appropriations (Public Law No. 115-141, § 230); (2) CBP's Fiscal Year 2019 appropriations (Public Law No.

116-6, § 230); or (3) funds received from the Treasury Forfeiture Fund pursuant to 31 U.S.C. § 9705. CBP will not use funds transferred pursuant to authorities invoked in the President's February 15, 2019 national emergency proclamation, including 10 U.S.C. § 2808, or pursuant to 10 U.S.C. § 284 for any ongoing or planned barrier construction in the RGV.

CBP's Use of Treasury Forfeiture Funds

9. On December 26, 2018, DHS submitted a request to the United States Department of the Treasury (Treasury) to use Treasury Forfeiture Funds (TFF) in order to enhance border security infrastructure and operations in support of CBP's law enforcement efforts. Treasury approved DHS' request and, on February 15, 2019, notified Congress of this action.

10. TFF are being made available to CBP in two tranches. The first tranche of $242 million was made available to CBP for obligation on March 14, 2019. The second tranche of $359 million is expected to be made available for obligation at a later date upon Treasury's receipt of additional anticipated forfeitures.

11. CBP's Fiscal Year 2019 appropriation provided $1.375 billion for the construction of primary pedestrian fencing in the RGV. CBP intends to start obligating these funds in the near future, but may not finish obligating the entirety of these funds before it begins to obligate TFF funds. Although CBP has not made any decisions about when it will begin obligating TFF funds, CBP intends to obligate all available TFF funds before the end of Fiscal Year 2019 or, if not, before the end of the 2019 calendar year.

12. With respect to funding barrier construction along the southern border, CBP will use TFF funds exclusively for projects in the RGV. CBP will not use TFF funds to build

barrier construction projects in the other eight sectors along the southern border. CBP may use some TFF funds for planning related to barrier construction projects in other sectors, but no decisions have been made to use TFF funds for that purpose.

This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct to the best of my current knowledge.

Executed on this 1 day of April, 2019.

Loren Flossman

Digitally signed by Loren Flossman
DN: cn=Loren Flossman, o=Border Wall PMO, ou=Portfolio Manager, email=Loren.w.flossman@cbp.dhs.gov, c=US
Date: 2019.04.01 07:46:58 -04'00'

Loren Flossman
Acquisition Program Manager
U.S. Customs and Border Protection

EXHIBIT 2

DECLARATION OF KENNETH P. RAPUANO

I, KENNETH P. RAPUANO, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Assistant Secretary of Defense for Homeland Defense and Global Security (ASD(HD&GS)). Among other duties, which are generally reflected in Department of Defense (DoD) Directive 5111.13, I am responsible for developing, coordinating, and overseeing implementation of DoD policy for plans and activities related to defense support of civil authorities. The Secretary of Defense established and designated the ASD(HD&GS) to manage the DoD Border Security Support Cell, on April 5, 2018. The DoD Border Security Support Cell is the focal point and integrator for all requests for assistance, taskings, and information related to DoD support pursuant to the President's April 4, 2018, memo, "Securing the Southern Border of the United States."

2. This declaration is based on my own personal knowledge and information made available to me in the course of my official duties.

3. On February 15, 2019, the President of the United States, in accordance with the National Emergencies Act, 50 U.S.C. §§ 1601-1651, declared that a national emergency exists at the southern border of the United States. In accordance with the declaration, the President invoked section 12302 of title 10, United States Code, and made that statutory authority available, according to its terms, to the Secretaries of the military departments concerned, subject to the direction of the Secretary of Defense in the case of the Secretaries of the Army, Navy, and Air Force. To provide additional authority to DoD in support of the Federal Government's response to the national emergency at the southern border, the President declared that this emergency requires use of the armed forces and, in accordance with section 301 of the National Emergencies Act (50 U.S.C. § 1631), that the construction authority provided in section 2808 of title 10, United States Code, is invoked and made available, according to its terms, to the Secretary of Defense and, at the discretion of the Secretary of Defense, to the Secretaries of the military departments. *See* Exhibit A.

4. Under section 2808, whenever the President declares a national emergency "that requires use of the armed forces," the Secretary of Defense may undertake or authorize military construction projects "not otherwise authorized by law that are necessary to support such use of the armed forces" 10 U.S.C. § 2808(a). The Acting Secretary of Defense has not yet decided to undertake or authorize any barrier construction projects under section 2808. To inform the Acting Secretary's decision, on March 20, 2019, the Secretary of Homeland Security provided a prioritized list of proposed border barrier construction projects that the Department of Homeland Security (DHS) assesses would improve the efficiency and effectiveness of the armed forces supporting DHS in securing the southern border. To further inform his decision, the Acting Secretary will also seek the military advice of the Chairman of the Joint Chiefs of Staff.

5. The DoD Comptroller will consult with the military departments to examine which military construction projects that are projected to be awarded in fiscal year 2020 or later might be deferred to fund barrier construction projects, in the event the Acting Secretary determines that

such projects are necessary to support the use of the armed forces. When evaluating the potential funding sources for potential section 2808 construction projects, DoD will consider (1) projects not yet awarded that could potentially be deferred, (2) projects that are scheduled to be awarded after fiscal year 2019, and (3) projects that pose minimal operational or readiness risks if delayed. Family housing, barracks, and dormitory projects will not be used as potential funding sources.

***

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 1, 2019

KENNETH P. RAPUANO

EXHIBIT A

DECLARING A NATIONAL EMERGENCY CONCERNING THE SOUTHERN BORDER OF THE UNITED STATES

- - - - - - -

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency. The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate. In response to the directive in my April 4, 2018, memorandum and subsequent requests for support by the Secretary of Homeland Security, the Department of Defense has provided support and resources to the Department of Homeland Security at the southern border. Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.

NOW, THEREFORE, I, DONALD J. TRUMP, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 *et seq.*), hereby declare that

a national emergency exists at the southern border of the United States, and that section 12302 of title 10, United States Code, is invoked and made available, according to its terms, to the Secretaries of the military departments concerned, subject to the direction of the Secretary of Defense in the case of the Secretaries of the Army, Navy, and Air Force. To provide additional authority to the Department of Defense to support the Federal Government's response to the emergency at the southern border, I hereby declare that this emergency requires use of the Armed Forces and, in accordance with section 301 of the National Emergencies Act (50 U.S.C. 1631), that the construction authority provided in section 2808 of title 10, United States Code, is invoked and made available, according to its terms, to the Secretary of Defense and, at the discretion of the Secretary of Defense, to the Secretaries of the military departments.

I hereby direct as follows:

Section 1. The Secretary of Defense, or the Secretary of each relevant military department, as appropriate and consistent with applicable law, shall order as many units or members of the Ready Reserve to active duty as the Secretary concerned, in the Secretary's discretion, determines to be appropriate to assist and support the activities of the Secretary of Homeland Security at the southern border.

Sec. 2. The Secretary of Defense, the Secretary of the Interior, the Secretary of Homeland Security, and, subject to the discretion of the Secretary of Defense, the Secretaries of the military departments, shall take all appropriate actions, consistent with applicable law, to use or support the use of the authorities herein invoked, including, if necessary, the transfer and acceptance of jurisdiction over border lands.

Sec. 3. This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of February, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-third.

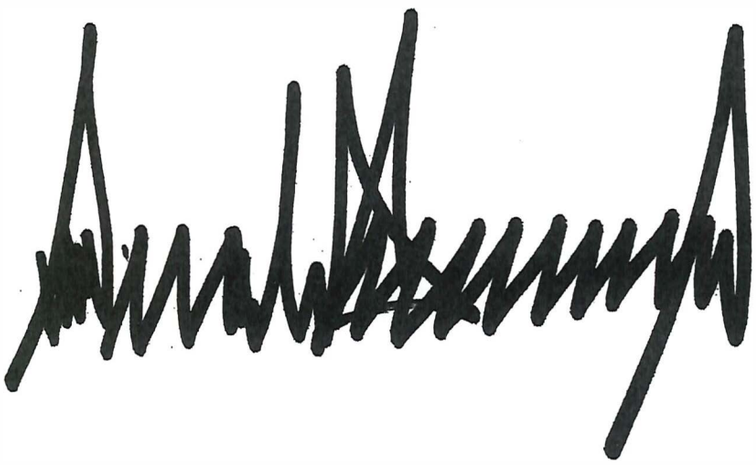

EXHIBIT 3

SECOND DECLARATION OF KENNETH P. RAPUANO

I, KENNETH P. RAPUANO, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Assistant Secretary of Defense for Homeland Defense and Global Security (ASD(HD&GS)). Among other duties, which are generally reflected in Department of Defense (DoD) Directive 5111.13, I am responsible for developing, coordinating, and overseeing implementation of DoD policy for plans and activities related to defense support of civil authorities. On April 5, 2018, the Secretary of Defense designated the ASD(HD&GS) to manage the then-newly established DoD Border Security Support Cell. The DoD Border Security Support Cell is the focal point and integrator for all requests for assistance, taskings, and information related to DoD support pursuant to the President's April 4, 2018, memo, "Securing the Southern Border of the United States."

2. This declaration is based on my own personal knowledge and information made available to me in the course of my official duties.

3. I previously executed a declaration dated April 25, 2019, that explained the status of DoD's support to the Department of Homeland Security (DHS) pursuant to 10 U.S.C. § 284 in response to a February 25, 2019, request from DHS for assistance in blocking up to 11 specific drug-smuggling corridors along certain portions of the southern border of the United States. The declaration explained that, on March 25, 2019, the Acting Secretary of Defense agreed to provide assistance to DHS to construct fencing to block drug-smuggling corridors in three project areas along of the southern border of the United States. The project areas are identified and described in my declaration as Yuma Sector Project 1, Yuma Sector Project 2, and El Paso Sector Project 1. The declaration explained that the Acting Secretary of Defense decided to use DoD's general transfer authority under section 8005 of the Department of Defense Appropriations Act, 2019, and section 1001 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 to transfer $1 billion between DoD appropriations to fund the approved projects.

4. My prior declaration also explained that the project identified as Yuma Sector Project 2 would be constructed pursuant to section 284 with money transferred pursuant under section 8005 of the Department of Defense Appropriations Act, 2019, and section 1001 of the John S. McCain National Defense Authorization Act for Fiscal Year. The U.S. Army Corps of Engineers has since decided not to fund or construct Yuma Project 2 under these authorities.

5. My prior declaration also explained that DoD was in the process of conducting a review of funding that might be available to support up to $1.5 billion of additional section 284 projects requested by DHS. My declaration stated that decisions regarding future transfer of funds and approval of additional DHS-requested projects under section 284 were expected in May 2019.

6. On May 9, 2019, the Acting Secretary of Defense approved four additional section 284 projects to block drug-smuggling corridors based on DHS's February 25, 2019, request. *See*

Exhibit A. One project is located in California (El Centro Project 1), and three projects are located in Arizona (Tucson Sector Projects 1, 2, and 3).

7. Also on May 9, 2019, the Acting Secretary of Defense decided to use DoD's general transfer authority under section 8005 of the Department of Defense Appropriations Act, 2019, and section 1001 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, as well as DoD's special transfer authority under section 9002 of the Department of Defense Appropriations Act, 2019, and section 1512 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, to transfer funds between DoD appropriations to fund the four newly approved projects. Specifically, he determined that the four projects will be funded through a transfer of $1.5 billion to the counter-narcotics support line of the Drug Interdiction and Counter-Drug Activities, Defense, account. *See* Exhibit B. Source accounts and explanations as to why the funds were available are described in more detail in Exhibit C.

8. On May 10, 2019, the Under Secretary of Defense (Comptroller)/Chief Financial Officer initiated the reprogramming to transfer funds pursuant to the above authorities. Congress was promptly notified of this transfer on May 10, 2019. *See* Exhibit C.

9. On May 10, 2019, the designated $1.5 billion was transferred from the Drug Interdiction and Counter-Drug Activities, Defense, account to the Operation and Maintenance, Army, account for use by the U.S. Army Corps of Engineers to undertake fence and road construction and lighting installation for the four projects approved on May 9, 2019.

10. The U.S. Army Corps of Engineers expects to award two contracts by May 16, 2019. One contract will be for Tucson Sector Projects 1, 2, and 3, approved on May 9, 2019. A second contract will be for El Centro Project 1 and Yuma Project 1, approved on May 9, 2019 and March 25, 2019, respectively.

11. The U.S. Army Corps of Engineers currently plans that construction of the four approved section 284 projects will begin no earlier than 45 days after the award of the contracts.

***

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 13, 2019

KENNETH P. RAPUANO

EXHIBIT A

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

5/9/19

MEMORANDUM FOR ACTING SECRETARY OF HOMELAND SECURITY

SUBJECT: Additional Support to the Department of Homeland Security

The Department of Defense appreciates that the Department of Homeland Security (DHS) confronts a continuing and worsening crisis at the southern border. As I indicated in my March 25, 2019 letter, in which I approved the undertaking of three projects to support to your Department's effort to secure the southern border by blocking drug-smuggling corridors along the border through the construction of roads and fences and the installation of lighting, the Department of Defense has continued to assess the availability of resources and other factors in order to determine how additional similar support can be provided to DHS.

10 U.S.C. § 284(b)(7) gives the Department of Defense the authority to construct roads and fences and to install lighting to block drug-smuggling corridors across international boundaries of the United States in support of counterdrug activities of Federal law enforcement agencies. For the following reasons, I have concluded that the support requested on February 25, 2019 satisfies the statutory requirements:

- DHS/Customs and Border Protection (CBP) is a Federal law enforcement agency;
- DHS has identified each project area as a drug-smuggling corridor; and
- The work requested by DHS to block these identified drug-smuggling corridors involves construction of fences (including linear ground detection systems), construction of roads, and installation of lighting (supported by grid power and including imbedded cameras).

Accordingly, at this time I have decided to undertake 4 additional projects, namely El Centro Sector Project 1, Tucson Sector Project 1, Tucson Sector Project 2, and Tucson Sector Project 3, by constructing 78.25 miles of 30-foot pedestrian fencing, constructing and improving roads, and installing lighting as described in the February 25, 2019 request.

As the proponent of the requested action, CBP will serve as the lead agency for environmental compliance and will be responsible for providing all necessary access to land. I request that DHS place the highest priority on completing these actions for the projects identified above. DHS will accept custody of the completed infrastructure, account for that infrastructure in its real property records, and operate and maintain the completed infrastructure.

The Commander, U.S. Army Corps of Engineers, is authorized to coordinate directly with DHS/CBP and immediately begin planning and executing up to $1.5B in support to DHS/CBP by undertaking the projects identified above.

Patrick M. Shanahan
Acting

cc:
Secretary of the Army
Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Policy
Under Secretary of Defense (Comptroller)/Chief Financial Officer
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant Secretary of Defense for Homeland Defense and Global Security
Assistant to the Secretary of Defense for Public Affairs
Commander, U.S. Army Corps of Engineers

EXHIBIT B

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

5/9/19

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE (COMPTROLLER)/CHIEF FINANCIAL OFFICER

SUBJECT: Additional Funding Construction in Support of the Department of Homeland Security Pursuant to 10 U.S.C. § 284

On February 25, 2019 the Secretary of Homeland Security requested that DoD provide support to the efforts of the Department of Homeland Security (DHS) to secure the southern border by blocking up to 11 drug-smuggling corridors along the border through the construction of roads and fences and the installation of lighting. I have determined that the requirements of title 10, U.S. Code, section 284, have been satisfied. Accordingly, I have approved DoD support for El Centro Sector Project 1, Tucson Sector Project 1, Tucson Sector Project 2, and Tucson Sector Project 3 (DHS Priority Projects 4, 5, 6, and 7) and have authorized up to $1.5B in funding for the construction of 30-foot pedestrian fencing, the construction and improvement of roads, and the installation of lighting to block drug-smuggling corridors along the southern border.

I have also decided that the Department will transfer both base funds and funds designated for Overseas Contingency Operations to provide the support described above. This support will be funded through a transfer of $1.5B from the accounts identified in the Enclosure into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation. I am advised that the amounts are excess or early to current programmatic needs. You should undertake a reprogramming action to effectuate such transfer, as authorized by law.

The reprogramming action that I am directing satisfies the statutory requirements. I have determined that a transfer of funds and authorization of appropriations for the construction of fences and roads and the installation of lighting to block drug-smuggling corridors is in the national interest. In an April 4, 2018 memorandum, "Securing the Southern Border of the United States," the President directed DoD to assist DHS in stopping the flow of illegal drugs into the United States. The reprogramming action is necessary to advance that goal. I have also determined that the other requirements of section 8005 and 9002 of the DoD Appropriations Act, 2019, and section 1001 and 1512 of the John S. McCain National Defense Authorization Act for FY 2019 are met as set forth below:

- The items to be funded (El Centro Sector Project 1, Tucson Sector Project 1, Tucson Sector Project 2, and Tucson Sector Project 3) are a higher priority than the items from which funds and authorizations are transferred because these projects are necessary in the national interest to prevent the flow of drugs into the United States, and the items from which funds and authorizations are transferred are excess or early to need.

- Support to law enforcement under section 284 for the construction of fences and roads and the installation of lighting to block drug-smuggling corridors is a military requirement assigned by statute. The need to provide support for the above projects was an unforeseen military requirement not known at the time of the FY 2019 budget request.

- Support under section 284 for construction of roads and fences and the installation of lighting, including for the projects listed above, has not been denied by Congress. Congress has not enacted legislation that denies funding for the item referenced in the transfer – namely counter-drug activities funding, including fence construction, under § 284(b)(7).

I have determined that providing the requested support for the projects listed above will not adversely affect the military preparedness of the United States. The sources of funds to be utilized to provide this support are identified in the Enclosure. Utilizing these funds for support to DHS does not affect the military preparedness of the United States because they are excess or early to current programmatic needs.

This $1.5B in funds will be allocated to the Department of the Army with instructions to allocate it further to the U.S. Army Corps of Engineers to undertake fence and road construction and lighting installation, including initial project scoping and contracting, for the approved projects.

No funds may be transferred or re-programmed from the drug-demand-reduction program, the National Guard counter-drug program, or the National Guard counter-drug schools program in order to fund subsection 284(b)(7) support to DHS.

You will comply with all statutory requirements, but will do so without regard to comity-based policies that require prior approval from congressional committees.

My point of contact is Kenneth Rapuano, Assistant Secretary of Defense for Homeland Defense and Global Security.

Patrick M. Shanahan
Acting

Enclosure:
As stated

cc:
Secretaries of the Military Departments
Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Policy
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant Secretary of Defense for Homeland Defense and Global Security
Assistant to the Secretary of Defense for Public Affairs
Commander, U.S. Army Corps of Engineers

EXHIBIT C

Unclassified **REPROGRAMMING ACTION - INTERNAL REPROGRAMMING**

Subject: Drug Interdiction and Counter-Drug Activities, Defense	**DoD Serial Number:** FY 19-16 IR
Appropriation Title: Various Appropriations	**Includes Transfer?** Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		**Program Previously Approved by Sec Def**		**Reprogramming Action**		**Revised Program**	
Line Item	**Quantity**	**Amount**	**Quantity**	**Amount**	**Quantity**	**Amount**	**Quantity**	**Amount**
a	b	c	d	e	f	g	h	i

This reprogramming action transfers $1,500.000 million from the Drug Interdiction and Counter-Drug Activities, Defense, 19/19, appropriation to Operation and Maintenance, Army, 19/19, appropriation for drug interdiction and counter-drug activities consistent with the provisions in division A of Title VI of Public Law 115-245, the Department of Defense (DoD) Appropriations Act, 2019.

Realignment of funds between Drug Interdiction projects may be accomplished only with the concurrence of the Office of the Deputy Assistant Secretary of Defense, Counternarcotics and Global Threats. No funds made available in this reprogramming action may be obligated for projects pursuant to sections 321, 322, or 333 of Title 10, United States Code. This prohibition will be noted on all Funding Authorization Documents.

FY 2019 REPROGRAMMING INCREASE:			**+1,500,000**	
Operation and Maintenance, Army, 19/19			**+1,500,000**	
Budget Activity 01: Operating Forces				
Counter-Narcotics Support	-	1,216,874	**+1,500,000**	2,716,874
FY 2019 REPROGRAMMING DECREASE:			**-1,500,000**	
Drug Interdiction and Counter-Drug Activities, Defense, 19/19			**-1,500,000**	
Budget Activity 01: Counter-Narcotics Support				
	1,738,306	1,738,306	**-1,500,000**	238,306

Explanation: Transfers funds from the Drug Interdiction and Counter-Drug Activities, Defense, 19/19, appropriation to Operation and Maintenance, Army, 19/19, appropriation to support the Department of Homeland Security (DHS) request for DoD to support drug interdiction and counter-drug activities through the construction of roads and fences, and the installation of lighting, to block drug smuggling corridors across international boundaries of the United States.

Approved (Signature and Date)

Unclassified

REPROGRAMMING ACTION

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	DoD Serial Number: FY 19-02 RA
Appropriation Title: Various Appropriations	Includes Transfer? Yes

Component Serial Number:	(Amounts in Thousands of Dollars)							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i

This reprogramming action is submitted because these actions use general and special transfer authority. This reprogramming action provides funding in support of higher priority items, based on unforeseen military requirements, than those for which originally appropriated; and is determined to be necessary in the national interest. It meets all administrative and legal requirements, and none of the items has previously been denied by the Congress.

Part I of this reprogramming action transfers $818.465 million between Fiscal Year (FY) 2019 Defense appropriations. This reprogramming action uses $818.465 million of general transfer authority pursuant to section 8005 of division A of Public Law 115-245, the Department of Defense (DoD) Appropriations Act, 2019; and section 1001 of Public Law 115-232, the John S. McCain National Defense Authorization Act for FY 2019.

Part II of this reprogramming action transfers $681.535 million between FY 2019 Title IX, Overseas Contingency Operations (OCO) Defense appropriations. This reprogramming action uses $681.535 million of special transfer authority pursuant to section 9002 of Title IX, OCO, of division A of Public Law 115-245, the Department of Defense (DoD) Appropriations Act, 2019 and section 1512 of Public Law 115-232, the John S. McCain National Defense Authorization Act for FY 2019.

PART I

FY 2019 REPROGRAMMING INCREASE: **+818,465**

Drug Interdiction and Counter-Drug Activities, Defense, 19/19 **+818,465**

Budget Activity 01: Counter-Narcotics Support

	238,306	238,306	**+818,465**	1,056,771

Explanation: Funds are required to provide support for counter-drug activities of the Department of Homeland Security (DHS). DHS has identified areas along the southern border of the United States that are being used by individuals, groups, and transnational criminal organizations as drug smuggling corridors, and determined that the construction of additional physical barriers and roads in the vicinity of the United States border is necessary in order to impede and deny drug smuggling activities. DHS requests DoD assistance in the execution of projects to replace existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing, construct roads, and install lighting. Title 10, U.S.Code, Section 284(b)(7) authorizes the DoD to support counterdrug activities of other Federal agencies through the construction of roads and fences, and the installation of lighting, to block drug smuggling corridors across international boundaries of the United States. Such support is funded using DoD's Drug Interdiction and Counter-Drug Activities appropriation.

Approved (Signature and Date)

Subject: Support for DHS Counter-Drug Activity Reprogramming Action

Appropriation Title: Various Appropriations

DoD Serial Number: FY 19-02 RA

Includes Transfer? Yes

Component Serial Number:

(Amounts in Thousands of Dollars)

Line Item	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i
FY 2019 REPROGRAMMING DECREASES:						**-818,465**		
ARMY DECREASES						**-35,959**		
Reserve Personnel, Army, 19/19						**-10,599**		
Budget Activity 01: Reserve Component Training and Support								
		4,873,661		4,873,661		**-10,599**		4,863,062
Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-5.018 million) and Continuation Pay (CP) ($-5.581 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.								
National Guard Personnel, Army, 19/19						**-25,360**		
Budget Activity 01: Reserve Component Training and Support								
		8,980,394		8,980,394		**-25,360**		8,955,034
Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-14.503 million) and Continuation Pay (CP) ($-10.857 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.								
NAVY DECREASES						**-129,251**		
Military Personnel, Navy, 19/19						**-88,503**		
Budget Activity 01: Pay and Allowances of Officers								
		8,840,745		8,840,745		**-33,002**		8,407,743
Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-25.496 million) and Continuation Pay (CP) ($-7.506 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.								
Budget Activity 02: Pay and Allowances of Enlisted								
		19,702,868		19,702,868		**-55,501**		19,647,367
Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-37.733.million) and Continuation Pay (CP) ($-17.768 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.								

Subject: Support for DHS Counter-Drug Activity Reprogramming Action

Appropriation Title: Various Appropriations

DoD Serial Number: FY 19-02 RA

Includes Transfer? Yes

Component Serial Number:

(Amounts in Thousands of Dollars)

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	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
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Military Personnel, Marine Corps, 19/19						**-36,653**		
Budget Activity 01: Pay and Allowances of Officers								
		3,065,655		3,065,655		**-12,030**		3,053,625
Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-12.030 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.								
Budget Activity 02: Pay and Allowances of Enlisted								
		9,517,117		9,517,117		**-24,623**		9,492,494
Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-23.287 million) and Continuation Pay (CP) ($-1.336 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.								
Reserve Personnel, Navy, 19/19						**-4,095**		
Budget Activity 01: Reserve Component Training and Suppor								
		2,064,037		2,064,037		**-4,095**		2,059,942
Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-2.923 million) and Continuation Pay (CP) ($-1.172 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.								
AIR FORCE DECREASES						**-402,255**		
Military Personnel, Air Force, 19/19						**-45,249**		
Budget Activity 01: Pay and Allowances of Officers								
		9,773,411		9,771,327		**-45,249**		9,726,078
Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-30.785 million) and Continuation Pay (CP) ($-14.464 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.								

Subject: Support for DHS Counter-Drug Activity Reprogramming Action

Appropriation Title: Various Appropriations

DoD Serial Number: FY 19-02 RA

Includes Transfer? Yes

Component Serial Number:

(Amounts in Thousands of Dollars)

Line Item	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
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a	b	c	d	e	f	g	h	i
Reserve Personnel, Air Force, 19/19						**-4,835**		
Budget Activity 01: Reserve Component Training and Support								
		1,885,498		1,885,498		**-4,835**		1,880,663

Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-4.274 million) and Continuation Pay (CP) ($-0.561 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.

National Guard Personnel, Air Force, 19/19						**-8,571**		
Budget Activity 01: Reserve Component Training and Support								
		3,761,744		3,761,744		**-8,571**		3,753,173

Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-5.220 million) and Continuation Pay (CP) ($-3.351 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.

Aircraft Procurement, Air Force 19/21						**-57,000**		
Budget Activity 05: Modification of In-service Aircraft								
E-3		116,865		116,865		**-57,000**		59,865

Explanation: Funds are available due to schedule delays in the Diminishing Manufacturing Sources Replacement of Avionics for Global Operations and Navigation (DRAGON) integration. DRAGON integration is delayed for two primary reasons. First, aircraft have been available for Programmed Depot Maintenance (PDM) at a slower than planned rate. Second, block 40/45 upgrades, which are still ongoing, must be completed before DRAGON integration. Therefore, funds for DRAGON integration are early to need.

Missile Procurement, Air Force 19/21						**-76,900**		
Budget Activity 02: Other Missiles								
Predator Hellfire Missile	3,437	288,765	3,437	288,765	-	**-23,000**	3,437	265,765

Explanation: Funds are available due to contract savings from all variants that provide precision kill capabilities. Savings are attributed to negotiated lower unit costs per missile system.

Subject: Support for DHS Counter-Drug Activity Reprogramming Action

DoD Serial Number: FY 19-02 RA

Appropriation Title: Various Appropriations

Includes Transfer? Yes

Component Serial Number:

(Amounts in Thousands of Dollars)

Line Item	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i
Budget Activity 03: Modification of In-service Missiles								
Minuteman III Modifications		124,592		124,592		**-24,300**		100,292

Explanation: Funds are available due to a slip in the production schedule to FY 2020 for the Launch Control Block Upgrade program due to late design changes to the Journal Memory Loader and Printer.

Air Launch Cruise Missile (ALCM)		47,632		47,632		**-29,600**		18,032

Explanation: Funds are available due to contract savings from reduced guided missile flight controller modification requirements; and due to lack of executable requirements for Support Equipment and Low Cost Mods in FY 2019.

Space Procurement, Air Force, 19/21						**-209,700**		
Budget Activity 01: Space Procurement, AF								
Evolved Expendable Launch Capability		659,981		659,981		**-44,900**		615,081

Explanation: Funds are available due to the Space Test Program (STP)-4 satellite provider termination of the Robotic Servicing of Geosynchronous Satellites (RSGS) spacecraft. There is no longer a need for the National Security Space Launch (NSSL) launch capability mission integration required to launch this mission for this satellite, meaning the mission has been removed from the official launch mission manifest. The next possible launch Space Vehicle host is outside the 24-month planning cycle, therefore these funds are early to need.

Evolved Expendable Launch Vehicle (Space)								
	5	954,555	5	954,555	**-1**	**-164,800**	4	789,755

Explanation: Funds are available due to the Space Test Program (STP)-4 satellite provider termination of the Robotic Servicing of Geosynchronous Satellites (RSGS) spacecraft. There is no longer a need for the National Security Space Launch (NSSL) service for this satellite, meaning the mission has been removed from the official launch mission manifest. The next possible launch Space Vehicle host is outside the 24-month planning cycle, therefore these funds are early to need.

Subject: Support for DHS Counter-Drug Activity Reprogramming Action

Appropriation Title: Various Appropriations

DoD Serial Number: FY 19-02 RA

Includes Transfer? Yes

Component Serial Number:

(Amounts in Thousands of Dollars)

Line Item	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i
DEFENSE-WIDE DECREASES						**-251,000**		
Chemical Agent and Munitions Destruction, Defense, 19/20						**-251,000**		
Budget Activity 02: Chem Agents -RDT&E								
		886,728		886,728		**-251,000**		635,728

Explanation: Funds are available due to unexecuted prior year funding plus current year appropriation that was found to be more than sufficient to cover the program's funding needs in FY 2019. This is a fact-of-life asset in Chemical Materials Activity (CMA) and Assembled Chemical Weapons Alternatives (ACWA). Funds are available based on projected costs in FY 2019 (to include additional technologies at Blue Grass Chemical Agent-Destruction Pilot Plant (PCAPP) and at the Pueblo Chemical Agent-Destruction Pilot Plant (PCAPP). Due to cost avoidance that will be gained by shortening schedules at both sites, the program has an asset. This does not inhibit the ability to pursue efforts/technologies to accelerate the destruction of the remaining declared stockpile.

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	DoD Serial Number: FY 19-02 RA
Appropriation Title: Various Appropriations	Includes Transfer? Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i

PART II

FY 2019 REPROGRAMMING INCREASE: **+681,535**

Drug Interdiction and Counter-Drug Activities, Defense, 19/19 **+681,535**

Budget Activity 01: Counter-Narcotics Support

238,306 1,056,771 **+681,535** 1,738,306

Explanation: Funds are required to provide support for counter-drug activities of the Department of Homeland Security (DHS). DHS has identified areas along the southern border of the United States that are being used by individuals, groups, and transnational criminal organizations as drug smuggling corridors, and determined that the construction of additional physical barriers and roads in the vicinity of the United States border is necessary in order to impede and deny drug smuggling activities. DHS requests DoD assistance in the execution of projects to replace existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing, construct roads, and install lighting. Title 10, U.S.Code, Section 284(b)(7) authorizes the DoD to support counterdrug activities of other Federal agencies through the construction of roads and fences, and the installation of lighting, to block drug smuggling corridors across international boundaries of the United States. Such support is funded using DoD's Drug Interdiction and Counter-Drug Activities appropriation.

FY 2019 REPROGRAMMING DECREASES: **-681,535**

Afghanistan Security Forces Fund, 19/20 **-604,000**

Budget Activity 06: Afghan National Army

1,639,993 1,639,993 **-279,000** 1,360,993

Budget Activity 07: Afghan National Police

726,264 726,264 **-117,200** 609,064

Budget Activity 08: Afghan Air Force

1,728,263 1,728,263 **-71,900** 1,656,363

Budget Activity 09: Afghan Special Security Forces

825,480 825,480 **-135,900** 689,580

Explanation: Funds are available from the Afghanistan Security Forces Fund (ASFF) due to forward funding of Afghan National Defense and Security Forces (ANDSF) requirements in the FY 2018/2019 ASFF appropriation and from cost savings identified during a comprehensive contract management review conducted by the Commander, Combined Security Transition Command – Afghanistan (CSTC-

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	DoD Serial Number: FY 19-02 RA
Appropriation Title: Various Appropriations	Includes Transfer? Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i

A) from September 2018 through March 2019. The revised funding levels allow the CSTC-A to provide full support to the ANDSF sustainment, infrastructure, equipment, and training and operations requirements.

Operation and Maintenance, Defense-Wide, 19/20 **-77,535**

Defense Security Cooperation Agency

Budget Activity 04: Administration and Servicewide Activities

1,262,434 1,262,434 **-77,535** 1,184,899

Explanation: Funds are available from the Coalition Support Fund (CSF) due to no projected claims for reimbursements from key cooperating nations. The Department has preserved some CSF for projected Coalition Readiness Support Program requirements and Jordan border security reimbursements.

EXHIBIT 4

THIRD DECLARATION OF KENNETH P. RAPUANO

I, KENNETH P. RAPUANO, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Assistant Secretary of Defense for Homeland Defense and Global Security (ASD(HD&GS)). Among other duties, which are generally reflected in Department of Defense (DoD) Directive 5111.13, I am responsible for developing, coordinating, and overseeing implementation of DoD policy for plans and activities related to defense support of civil authorities. On April 5, 2018, the Secretary of Defense designated the ASD(HD&GS) to manage the then-newly established DoD Border Security Support Cell. The DoD Border Security Support Cell is the focal point and integrator for all requests for assistance, taskings, and information related to DoD support pursuant to the President's April 4, 2018, memo, "Securing the Southern Border of the United States."

2. This declaration is based on my own personal knowledge and information made available to me in the course of my official duties.

10 U.S.C. § 284(b)(7)

3. To date, the Acting Secretary of Defense has authorized $2.5 billion in border barrier construction support to DHS under 10 U.S.C. § 284(b)(7). The Acting Secretary of Defense does not intend, and is not currently planning, to provide additional border barrier construction support to DHS under § 284(b)(7) during the next six months.

4. In paragraph 8 of my second declaration, I stated that the Under Secretary of Defense (Comptroller)/Chief Financial Officer initiated the reprogramming to transfer funds on May 10, 2019. The reprogramming actions that initiated the transfer actually occurred on May 9, 2019. See Exhibit A, attached hereto which is an updated and signed version of the transfer notice that was provided to Congress on May 10, 2019. This exhibit replaces Exhibit C to my second declaration dated May 13, 2019.

5. On May 6, 2019, the Chairman of the Joints Chiefs of Staff submitted an assessment to the Acting Secretary of Defense addressing whether and how military construction projects could support the use of the armed forces in addressing the national emergency at the southern border. This internal assessment provides the Acting Secretary of Defense with information and recommendations about specific border barrier construction projects identified by the Department of Homeland Security. The Chairman's assessment analyzes various factors and is intended to inform the Acting Secretary's determination whether specific barrier construction projects are necessary to support the use of the armed forces and which specific projects to undertake. The Acting Secretary of Defense has taken no action on the assessment and has not yet decided to undertake or authorize any barrier construction projects under section 2808.

6. On May 6, 2019, the Under Secretary of Defense (Comptroller)/Chief Financial Officer identified existing unawarded military construction projects of sufficient value to provide up to $3.6 billion of funding for potential border barrier construction pursuant to section 2808. The

Comptroller reviewed the pool of current unawarded military construction projects with award dates after September 30, 2019. As directed by the Acting Secretary of Defense, the Comptroller excluded from consideration military housing, barracks, or dormitory projects, as well as military construction projects that already have been awarded. The Acting Secretary of Defense has taken no action on this information and has not yet decided to undertake or authorize any barrier construction projects under section 2808

7. The Acting Secretary of Defense is not expected to make a decision regarding any projects under section 2808 prior to May 22, 2019.

***

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 15, 2019

KENNETH P. RAPUANO

EXHIBIT A

Unclassified **REPROGRAMMING ACTION**

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	DoD Serial Number: FY 19-02 RA
Appropriation Title: Various Appropriations	Includes Transfer? Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
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This reprogramming action is submitted because these actions use general and special transfer authority. This reprogramming action provides funding in support of higher priority items, based on unforeseen military requirements, than those for which originally appropriated; and is determined to be necessary in the national interest. It meets all administrative and legal requirements, and none of the items has previously been denied by the Congress.

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PART I

FY 2019 REPROGRAMMING INCREASE:			**+818,465**	
Drug Interdiction and Counter-Drug Activities, Defense, 19/19			**+818,465**	
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Approved (Signature and Date)
Elaine McCusker 5/9/19

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	DoD Serial Number: FY 19-02 RA
Appropriation Title: Various Appropriations	Includes Transfer? Yes

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FY 2019 REPROGRAMMING DECREASES: **-818,465**

ARMY DECREASES **-35,959**

Reserve Personnel, Army, 19/19 **-10,599**

Budget Activity 01: Reserve Component Training and Support

4,873,661 4,873,661 **-10,599** 4,863,062

Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-5.018 million) and Continuation Pay (CP) ($-5.581 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.

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NAVY DECREASES **-129,251**

Military Personnel, Navy, 19/19 **-88,503**

Budget Activity 01: Pay and Allowances of Officers

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Budget Activity 02: Pay and Allowances of Enlisted

19,702,868 19,702,868 **-55,501** 19,647,367

Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-37.733.million) and Continuation Pay (CP) ($-17.768 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system.

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Budget Activity 01: Reserve Component Training and Support								
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Aircraft Procurement, Air Force 19/21						**-57,000**		
Budget Activity 05: Modification of In-service Aircraft								
E-3		116,865		116,865		**-57,000**		59,865

Explanation: Funds are available due to schedule delays in the Diminishing Manufacturing Sources Replacement of Avionics for Global Operations and Navigation (DRAGON) integration. DRAGON integration is delayed for two primary reasons. First, aircraft have been available for Programmed Depot Maintenance (PDM) at a slower than planned rate. Second, block 40/45 upgrades, which are still ongoing, must be completed before DRAGON integration. Therefore, funds for DRAGON integration are early to need.

Missile Procurement, Air Force 19/21						**-76,900**		
Budget Activity 02: Other Missiles								
Predator Hellfire Missile	3,437	288,765	3,437	288,765	-	**-23,000**	3,437	265,765

Explanation: Funds are available due to contract savings from all variants that provide precision kill capabilities. Savings are attributed to negotiated lower unit costs per missile system.

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	DoD Serial Number: FY 19-02 RA
Appropriation Title: Various Appropriations	Includes Transfer? Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i
Budget Activity 03: Modification of In-service Missiles								
Minuteman III Modifications		124,592		124,592		**-24,300**		100,292

Explanation: Funds are available due to a slip in the production schedule to FY 2020 for the Launch Control Block Upgrade program due to late design changes to the Journal Memory Loader and Printer.

Air Launch Cruise Missile (ALCM)		47,632		47,632		**-29,600**		18,032

Explanation: Funds are available due to contract savings from reduced guided missile flight controller modification requirements; and due to lack of executable requirements for Support Equipment and Low Cost Mods in FY 2019.

Space Procurement, Air Force, 19/21						**-209,700**		
Budget Activity 01: Space Procurement, AF								
Evolved Expendable Launch Capability		659,981		659,981		**-44,900**		615,081

Explanation: Funds are available due to the Space Test Program (STP)-4 satellite provider termination of the Robotic Servicing of Geosynchronous Satellites (RSGS) spacecraft. There is no longer a need for the National Security Space Launch (NSSL) launch capability mission integration required to launch this mission for this satellite, meaning the mission has been removed from the official launch mission manifest. The next possible launch Space Vehicle host is outside the 24-month planning cycle, therefore these funds are early to need.

Evolved Expendable Launch Vehicle (Space)	5	954,555	5	954,555	**-1**	**-164,800**	4	789,755

Explanation: Funds are available due to the Space Test Program (STP)-4 satellite provider termination of the Robotic Servicing of Geosynchronous Satellites (RSGS) spacecraft. There is no longer a need for the National Security Space Launch (NSSL) service for this satellite, meaning the mission has been removed from the official launch mission manifest. The next possible launch Space Vehicle host is outside the 24-month planning cycle, therefore these funds are early to need.

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	DoD Serial Number: FY 19-02 RA
Appropriation Title: Various Appropriations	Includes Transfer? Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i
DEFENSE-WIDE DECREASES						**-251,000**		
Chemical Agent and Munitions Destruction, Defense, 19/20						**-251,000**		
Budget Activity 02: Chem Agents -RDT&E								
		886,728		886,728		**-251,000**		635,728

Explanation: Funds are available due to unexecuted prior year funding plus current year appropriation that was found to be more than sufficient to cover the Assembled Chemical Weapons Alternative (ACWA) program's funding needs in FY 2019. Funds are available based on reduced projected costs in FY 2019 (to include additional destruction technologies at Blue Grass Chemical Agent-Destruction Pilot Plant (BCAPP) and at the Pueblo Chemical Agent-Destruction Pilot Plant (PCAPP). Due to cost avoidance that will be gained by shortening schedules at both sites, the ACWA program has an asset. This does not inhibit the ability to pursue efforts/technologies to accelerate the destruction of the remaining U.S. chemical weapons stockpile.

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	DoD Serial Number: FY 19-02 RA
Appropriation Title: Various Appropriations	Includes Transfer? Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i

PART II

FY 2019 REPROGRAMMING INCREASE: **+681,535**

Drug Interdiction and Counter-Drug Activities, Defense, 19/19 **+681,535**

Budget Activity 01: Counter-Narcotics Support

238,306 1,056,771 **+681,535** 1,738,306

Explanation: Funds are required to provide support for counter-drug activities of the Department of Homeland Security (DHS). DHS has identified areas along the southern border of the United States that are being used by individuals, groups, and transnational criminal organizations as drug smuggling corridors, and determined that the construction of additional physical barriers and roads in the vicinity of the United States border is necessary in order to impede and deny drug smuggling activities. DHS requests DoD assistance in the execution of projects to replace existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing, construct roads, and install lighting. Title 10, U.S.Code, Section 284(b)(7) authorizes the DoD to support counterdrug activities of other Federal agencies through the construction of roads and fences, and the installation of lighting, to block drug smuggling corridors across international boundaries of the United States. Such support is funded using DoD's Drug Interdiction and Counter-Drug Activities appropriation.

FY 2019 REPROGRAMMING DECREASES: **-681,535**

Afghanistan Security Forces Fund, 19/20 **-604,000**

Budget Activity 06: Afghan National Army

1,639,993 1,639,993 **-279,000** 1,360,993

Budget Activity 07: Afghan National Police

726,264 726,264 **-117,200** 609,064

Budget Activity 08: Afghan Air Force

1,728,263 1,728,263 **-71,900** 1,656,363

Budget Activity 09: Afghan Special Security Forces

825,480 825,480 **-135,900** 689,580

Explanation: Funds are available from the Afghanistan Security Forces Fund (ASFF) due to forward funding of Afghan National Defense and Security Forces (ANDSF) requirements in the FY 2018/2019 ASFF appropriation and from cost savings identified during a comprehensive contract management review conducted by the Commander, Combined Security Transition Command – Afghanistan (CSTC-A) from

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	DoD Serial Number: FY 19-02 RA
Appropriation Title: Various Appropriations	Includes Transfer? Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i

September 2018 through March 2019. The revised funding levels allow the CSTC-A to provide full support to the ANDSF sustainment, infrastructure, equipment, and training and operations requirements.

Operation and Maintenance, Defense-Wide, 19/20				**-77,535**	
Defense Security Cooperation Agency					
Budget Activity 04: Administration and Servicewide Activities					
	1,262,434	1,262,434		**-77,535**	1,184,899

Explanation: Funds are available from the Coalition Support Fund (CSF) due to no projected claims for reimbursements from key cooperating nations. The Department has preserved some CSF for projected Coalition Readiness Support Program requirements and Jordan border security reimbursements.

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RIO GRANDE INTERNATIONAL STUDY CENTER (RGISC), *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States of America, *et al.*, Defendants.	Civil Action No. 1:19-cv-00720 (TNM)

DECLARATION OF LOREN FLOSSMAN

I, Loren Flossman, declare as follows:

1. I am the Acquisition Program Manager for the Wall Program Management Office (Wall PMO), U.S. Border Patrol Program Management Directorate, U.S. Customs and Border Protection (CBP), an agency of the Department of Homeland Security (DHS). I have held this position since May 2018. Prior to this, I was the Director of the Border Patrol & Air and Marine Program (BPAM) Management Office within the Office of Facilities and Asset Management, CBP. BPAM is the office within CBP that historically was responsible for the construction and maintenance of facilities, tactical infrastructure, and border infrastructure such as barriers and roads that are required by the United States Border Patrol (Border Patrol) or CBP Air and Marine. Responsibility for border barrier projects was transferred from BPAM to Wall PMO. Therefore, Wall PMO is now responsible for border barrier projects, including the border barrier projects that are ongoing or being planned for along the U.S.-Mexico border, including in the Rio Grande Valley Sector (RGV) and Laredo Sector of Texas.

2. In my position, I am personally aware of CBP activities occurring in support of ongoing or planned border barrier projects in southern Texas, including activities on or near: (1) the area where the Rio Grande International Study Center (RGISC) is located and operates, (2) the Jackson Ranch Church and Cemetery and Eli Jackson Cemetery, and (3) the property of Ms. Elsa Hull. Plaintiffs RGISC, Ramiro R. Ramirez, Carrizo/Comecrudo Nation of Texas, and Elsa Hull each allege that CBP is planning to build a border barrier project on or near one of these locations. I make this declaration based upon my personal knowledge and belief, as well as information that I have received in my official capacity.
3. The purpose of this declaration is to inform the Court about whether there are border barrier projects planned for the locations listed above and what funds will be used for any such projects.

Planned Projects and Project Funding

4. RGISC asserts that it is located and operates in Laredo, Texas. It alleges that CBP is planning to build 55-miles of border barrier along Laredo's "middle reach." *See* Complaint ¶ 9.k.
5. Building a border barrier in the Laredo Sector is a top priority requirement for CBP. The border barrier projects currently planned for Laredo would be similar to other projects in Texas. The project would be approximately a 127 mile border barrier system which could include a bollard-style barrier, a 150-foot enforcement zone, gates for property owners to access the south side of the barrier, lighting, cameras, and an all-weather road. At this time, CBP has not determined the funding source that will be associated with Laredo Sector barrier construction. Thus, CBP has not started formally reaching out to

landowners within the proposed barrier alignment to begin the process of surveying, appraising, and eventually acquiring land in the finalized alignment. None of these actions will be initiated until funding is identified.

6. Although a funding source has not been identified, funding for this planned project will not come from any money made available to CBP through the Treasury Forfeiture Fund (TFF) (31 U.S.C. § 9705), which will be used for barrier construction exclusively in the RGV. Additionally, CBP has not requested, and has no plans to request, that the Department of Defense provide support pursuant to 10 U.S.C. § 284 to construct any border fencing in the Laredo Sector.

7. Dr. Ramiro R. Ramirez asserts that he is a landowner in Hidalgo County, Texas. He alleges that he owns the Jackson Ranch Church and Cemetery and has ancestors buried in both the Jackson Ranch Cemetery and nearby Eli Jackson Cemetery. The Carrizo/Comecrudo Nation of Texas asserts that ancestors of the Nation are also buried at the Jackson Ranch and Eli Jackson Cemeteries. Dr. Ramirez and the Nation allege that CBP is planning to build a levee border wall north of these properties. *See* Complaint ¶¶ 10.e, 11.g.

8. CBP is planning to construct a border barrier system near the Jackson Ranch Church and Cemetery and Eli Jackson Cemetery; however, the border barrier system will not be located through either cemetery. CBP decreased the enforcement zone near the properties to avoid the need to acquire and move any burial grounds. The project will not prohibit anyone from visiting the cemeteries. The planned project will be funded using CBP's Fiscal Year 2019 appropriated funds (Public Law 116-6, § 230). It will not be constructed, as Plaintiffs allege, with funds transferred pursuant to the President's

national emergency proclamation, including 10 U.S.C. § 2808, or pursuant to 10 U.S.C. § 284 or 31 U.S.C. § 9705.

9. Ms. Elsa Hull asserts that she is a resident of Zapata County, Texas, and lives at 103 Laurel in San Ygnacio. She alleges that CBP plans to build a border barrier in Zapata County along the stretch of the Rio Grande River where she lives. *See* Compliant ¶¶ 12.c-d.
10. CBP, however, is not currently planning a project for the address given by Ms. Hull for this or any future budget year. At this time, there are no ongoing or planned projects in Zapata County, Texas, at all, including those funded by CBP appropriations, funds transferred pursuant to the President's national emergency proclamation, including 10 U.S.C. § 2808, or pursuant to 10 U.S.C. § 284 or 31 U.S.C. § 9705.
11. Consistent with other cases, any Declaration of Taking ultimately filed in relation to any border barrier project will state the funding and taking authority being used for acquisition of the property.

This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct to the best of my current knowledge.

Executed on this 31 day of May, 2019.

Loren Flossman
Acquisition Program Manager
U.S. Customs and Border Protection

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RIO GRANDE INTERNATIONAL STUDY CENTER (RGISC), *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States of America, *et al.*,

Defendants.

Civil Action No. 1:19-cv-00720 (TNM)

[PROPOSED] ORDER

Upon consideration of Defendants' Motion to Dismiss, it is hereby **ORDERED** that the Motion is **GRANTED**.

SO ORDERED.

Dated: _____, 2019

TREVOR N. McFADDEN
United States District Judge